Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

HOTEL & MOTEL ASSOCIATION OF OAKLAND, *et al.*,
Petitioners,

v.

CITY OF OAKLAND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly refused to apply this Court's decision in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), to address a facial constitutional challenge to a city ordinance and instead applied a conflicting standard reflected in *United States* v. *Salerno*, 481 U.S. 739 (1987).

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Ninth Circuit are listed in Appendix A at Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Hotel and Motel Association of Oakland states that it has no parent corporation and it has issued no publicly held stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Hotel and Motel Association of Oakland and its members respectfully request that this Court grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 344 F.3d 959 (9th Cir. 2003) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a to 21a. The court of appeals' order denying the petition for rehearing and rehearing *en banc* is unpublished and is reproduced at Pet. App. 50a to 51a. The relevant orders of the United States District Court for the Northern District of California are unpublished. That court's order granting in part, denying in part, defendants' motion to dismiss plaintiffs' first amended complaint is reproduced at Pet. App. 25a to 49a. The district court's stipulation and judgment of dismissal is reproduced at Pet. App. 22a to 24a.

JURISDICTION

The court of appeals entered judgment on September 17, 2003, and denied timely petitions for rehearing and rehearing *en banc* on November 13, 2003. On February 4, 2004, Justice O'Connor granted an extension of time within which to file a petition for a writ of certiorari, up to and including March 12, 2004. On March 4, 2004, Justice O'Connor granted a second extension of time, up to and including April 1, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(l).

RELEVANT STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 provides, in pertinent part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

The Fourteenth Amendment provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law."

The complete texts of Oakland Municipal Ordinances No. 12136 and No. 12137 are reproduced at Pet. App. 52a to 82a.

STATEMENT OF THE CASE

This case presents the issue of what is the appropriate standard for addressing a facial challenge to a government ordinance that is impermissibly vague and that imposes expansive and open-ended law enforcement responsibilities upon private individuals.

Applying this Court's standard in *United States* v. *Salerno*, 481 U.S. 739 (1987), the court of appeals upheld the city ordinances against a facial attack based upon unconstitutional vagueness because "'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" Pet. App. 17a (alteration in original) (quoting *Salerno*, 481 U.S. at 745). In doing so, the court of appeals recognized—as have other courts of appeals—that this Court's "most recent discussion of facial vagueness challenges has cast some doubt on the 'no set of circumstances' requirement" set forth in *Salerno*. *Id.* Specifically, the court below explained that in *City of*

Chicago v. *Morales*, 527 U.S. 41 (1999), "the Court did not apply the *Salerno* test in reviewing, and ultimately upholding, a facial challenge to an ordinance banning gang members from loitering in public places after being ordered to disperse." Pet. App. 17a-18a. Nevertheless, the court of appeals refused to apply *Morales* and instead held that until "a majority of the Supreme Court directs otherwise, a party challenging the facial validity of an ordinance on vagueness grounds outside the domain of the First Amendment must demonstrate that 'the enactment is impermissibly vague in all of its applications.'" *Id.* at 19a (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

The court of appeals' refusal to apply the standards set forth in this Court's *Morales* decision warrants further review. This Court has acknowledged its competing lines of precedent and the seemingly inconsistent application of these varied approaches in a host of contexts. *Morales*, however, is this Court's most-recent decision setting forth the standards for assessing a vagueness challenge to a criminal ordinance that contains no *mens rea* requirement. The court of appeals refusal to apply this Court's decision in *Morales*—which the court below justified based upon its confusion whether *Morales* or *Salerno* reflected the binding standard for resolving a facial challenge to the constitutionality of a government enactment, Pet. App. 19a—itself warrants further review by this Court because this is the only Court that can clarify the inconsistency between its decisions. See Sup. Ct. R. 10(c).

Moreover, confusion over what standard applies to the resolution of facial challenges has permeated the federal courts of appeals, which have struggled to reconcile this Court's competing commands. See *United States* v. *Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc) (holding that court was "not required to apply *[Morales]*"); *Horton* v. *City of St. Augustine, Fla.*, 272 F.3d 1318, 1330 (11th Cir. 2001) (noting

"inroads into *Salerno*'s rule have developed"); cf. *A Women's Choice-East Side Clinic* v. *Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (rejecting *Salerno* as dicta), *cert denied*, 537 U.S. 1192 (2003). Legal commentators as well have highlighted the competing threads in this Court's precedent and underscored the importance of providing necessary guidance to the lower courts. Absent a uniform standard, similarly situated cases will result in different outcomes based solely on the happenstance of geography, rather than on the merits of their underlying claims. Simply put, resolution of the proper standard to apply in addressing a facial challenge to the constitutionality of a government enactment is an important and recurring issue of federal law that warrants further review by this Court. See Sup. Ct. R. 10(a), (c).

What is more, this case presents an appropriate vehicle for the Court to resolve this confusion because the ordinance at issue here cannot be upheld under the standard reflected in *Morales*. Specifically, a violation of City Ordinance No. 12136 subjects private individuals operating their businesses to criminal penalties for failing to prevent others from engaging in a laundry-list of objectionable conduct not only on their property, but also in "close proximity" thereto. Here, imposition of criminal penalties is authorized, without any *mens rea* requirement, if the "operation of the property . . . result[s] in repeated nuisance activities on the property or contribute[s] to nuisance activities in close proximity to the property." Pet. App. 62a. "[N]uisance activities" are listed to include "illegal drug activity," "prostitution," and "public drunkenness," as well as "harassment of passers by," "illegal parking," "traffic violations, curfew violations, lewd conduct, or police detentions and arrests." *Id.*

To avoid criminal sanction, owners of hotels or motels subject to this ordinance must, in effect, prevent any and all illegal or potentially illegal activity from occurring on or in close proximity to their property. As a result, Ordinance No. 12136 criminalizes a broad swath of purely innocent

conduct—e.g., failing to stop nuisance activities about which a person has no knowledge and/or control—and requires private individuals to take on a broad range of traditional law enforcement responsibilities simply to avoid criminal prosecution and to pursue their chosen livelihood.

A. City Of Oakland Ordinances No. 12136 And No. 12137.

At issue in this case are two ordinances, No. 12136 and No. 12137, which were enacted on May 11, 1999, by the Council of the City of Oakland to establish "Operating Standards for Hotels, Motel and Rooming Houses." Pet. App. 52a (capitalization omitted).[1] Taken together, they provide "minimum standards related to room furnishings, linens, housekeeping services and security." *Id.* In particular, Ordinance No. 12136 creates minimum standards applicable to hotels and motels on such diverse topics as "management practices," "inspection of records and facilities," "property security," "housekeeping conditions in excess of normal 'Wear and Tear,'" "room furnishings," "exterior of property," and "common areas." *Id.* at 56a-62a (capitalization omitted). Adoption of these minimum standards was designed to "promote the health, safety, comfort, convenience, prosperity, and general welfare by requiring that businesses that offer shelter to visitors, transient guests, and other residents provide a minimum level of cleanliness, quality, and security." *Id.* at 55a. None of those various minimum standards is at issue here.

Ordinance No. 12136, however, requires substantially more from private owners of hotels and motels. In particular, Ordinance No. 12136 amends the Oakland Municipal Code to add Section 8.03.120, which is entitled "Criminal and Nuisance Activity." Pet. App. 62a. Under Section 8.03.120,

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[1] Specifically, Ordinance No. 12137 creates the "Deemed Approved" program whereby formerly non-conforming uses are subjected to the requirements reflected in Ordinance No. 12136. Pet. App. 67a-82a.

to avoid criminal penalties, owners of hotels and motels are required to ensure that "[t]he operation of the property shall not result in repeated nuisance activities on the property or contribute to nuisance activities in close proximity to the property." *Id.*[2] Section 8.03.120 contains no *mens rea* requirement. To avoid criminal prosecution, owners of hotels and motels are subjected to an almost impossible burden by requiring them to engage in law enforcement activities not only on their own property, but also in areas deemed to be in close proximity to their property. *Id.* What is more, Section 8.03.120 vests law enforcement officials with virtual carte blanche in determining whether there has been a violation of this strict liability provision.

There can be no question that adoption of Section 8.03.120 was motivated by a belief that property owners should be forced to engage in police-enforcement activities traditionally undertaken by public police enforcement entities. Indeed, to justify Ordinance No. 12136, the City Council candidly noted that "the Oakland Police Department has expended an inordinate amount of time and resources in policing certain of these businesses, in order to limit or control widespread use of the properties for the purpose of narcotics and prostitution activity," Pet. App. 52a, and that there was evidence that, in the City Council's view, "the operators of problem properties take minimal action to screen or monitor the activities of their patrons," *id.* at 53a.

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[2] Nuisance activities "includ[e]," but are not "limited to":

> disturbance of the peace, illegal drug activity, prostitution, public drunkenness, drinking in public other than at a licensed facility, harassment of passers by, gambling, sales of stolen goods, public urination, theft, assaults, batteries, acts of vandalism, illegal parking, excessive loud noises, especially in the late night or early morning hours, traffic violations, curfew violations, lewd conduct, or police detentions and arrests.

Pet. App. 62a.

B. Petitioner's Vagueness Challenge.

In August 1999, petitioner Hotel and Motel Association of Oakland, which represents the interests of various owners and operators of hotels and motels in Oakland, California, brought suit along with its individual members under 42 U.S.C. § 1983, and challenged, among other things, the enactment of the Criminal and Nuisance Activity section of Ordinance No. 12136. Petitioners explained that Ordinance No. 12136 adopted operating standards that imposed "various criminal and civil penalties and fines for violations" of those standards. See Complaint for Damages and Injunctive Relief ¶ 7. Petitioners highlighted that these new standards required property owners and operators to "prevent[] . . . criminal and nuisance activity on or in the vicinity of the properties," *id.*, and that the Ordinance "places legal burdens on the hotel/motel owner and operator to correct nuisance activities that occur both on and off the property with no reasonable standards for administrative and legal guidance and enforcement." *Id.* ¶ 8; see also First Amended Complaint for Damages and Injunctive Relief ("First Am. Compl.") ¶¶ 16-17 (same). Petitioners explained that violation of Ordinance No. 12136 subjects owners and operators of hotels and motels "to criminal prosecution." First Am. Compl. ¶ 28. Accordingly, petitioners sought injunctive and other relief because Ordinance No. 12136 was "'void for vagueness.'" *Id.* ¶ 55.

C. The District Court's Decision.

The district court rejected petitioners' claim at the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 26a, 40a. The district court explained that petitioners' challenge "must be construed as a facial attack only" because there had been no allegation that the "challenged ordinances have been applied to anyone yet." *Id.* at 36a n.7. The district court concluded that petitioners' challenge could succeed only "'if the enactment is impermissibly vague in all of its applications.'" *Id.* at 37a

(quoting *Hoffman Estates*, 455 U.S. at 494-95). The district court noted that the "presence of criminal penalties in the ordinances raises the level of scrutiny somewhat," *id.* at 38a-39a, but rejected petitioners' showing that the ordinance impermissibly subjected them "to criminal sanctions for 'contributing' to 'nuisance activities in close proximity to the property,' instead of restricting the ordinances to activities occurring on the properties," *id.* at 37 n.8. According to the district court, "the ordinances are not impermissibly vague." *Id.* at 40a.

D. The Court of Appeals' Decision.

The court of appeals affirmed. Pet. App. 2a. At the outset, the court below noted that petitioners' facial challenge "present[ed] a hurdle that is difficult for the Association to scale." *Id.* at 16a. Applying this Court's decision in *United States* v. *Salerno*, 481 U.S. 739 (1987), the court of appeals explained that to prevail in a facial challenge outside the First Amendment context, "'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" Pet. App. 17a (alteration in original) (quoting *Salerno*, 481 U.S. at 745). The court of appeals recognized, however, that this "Court's most recent discussion of facial vagueness challenges has cast some doubt on the 'no set of circumstances' requirement" of *Salerno*. *Id.* Specifically, the court of appeals explained that in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), this Court "did not apply the *Salerno* test in reviewing, and ultimately upholding, a facial challenge to an ordinance banning gang members from loitering in public places after being ordered to disperse." Pet. App. 17a-18a. The court below noted that the *Morales* plurality "stated that the *Salerno* formulation was dictum." *Id.* at 18a. Although Section V of the *Morales* decision was joined by a majority of the Court, the court of appeals declined to be bound by *Morales*, explaining that "[u]ntil a *majority* of the Supreme Court directs otherwise, a party challenging the facial validity of an ordinance on vagueness grounds outside the domain of

the First Amendment must demonstrate that 'the enactment is impermissibly vague in all of its applications.'" *Id.* at 19a (quoting *Hoffman Estates*, 455 U.S. at 495) (emphasis added).

Because it concluded that "[n]o such showing was made here," the court of appeals rejected petitioners' facial vagueness challenge. Pet. App. 19a. The court below acknowledged that petitioners took "issue with the requirement in Ordinance No. 12136 that prohibits hotel operators from contributing to nuisance activities on or in 'close proximity to' the property." *Id.* Although the court of appeals acknowledged that there was no *mens rea* requirement, it nevertheless rejected that challenge because there had been no showing that "every (or any) application of that provision would qualify as unconstitutionally vague." *Id.* The court of appeals never purported to apply the competing vagueness standards set forth in *Morales*, and instead, applying the "all-or-nothing principle" embodied in *Salerno*, held that Ordinance No. 12316 was not "unconstitutionally vague on its face." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

This case presents the recurring issue of what standard should be applied by federal courts addressing a facial challenge to the constitutionality of a government enactment that subjects private individuals to criminal sanction for engaging in wholly innocent conduct. A majority of this Court in *City of Chicago* v. *Morales* ruled that a criminal statute that contains no *mens rea* requirement will be adjudged unconstitutionally vague if "reach[es] a substantial amount of innocent conduct" and fails to "'establish minimal guidelines to govern law enforcement.'" 527 U.S. 41, 60-61 (1999) (Stevens, J., writing for Court in Section V). The court of appeals, after discussing the tension between this Court's decisions in *Salerno* and *Morales*, refused to apply this Court's controlling decision in *Morales*. That ruling by itself warrants further review by this Court.

Moreover, the court of appeals is not alone in expressing confusion regarding the applicability of this Court's competing decisions in *Morales* and *Salerno*. Indeed, the Second, Eleventh and Seventh Circuits likewise have highlighted the difficulty of determining which of this Court's competing commands should be followed on the threshold question of the appropriate legal standard to apply in resolving facial challenges to government enactments. See *United States* v. *Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc) (holding that court "not required to apply *[Morales]*"); *Horton* v. *City of St. Augustine, Fla.*, 272 F.3d 1318, 1329-30 (11th Cir. 2001) (applying *Salerno* but noting that "inroads into *Salerno*'s rule have developed"); cf. *A Women's Choice-East Side Clinic* v. *Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (rejecting *Salerno* as dicta), *cert. denied*, 537 U.S. 1192 (2003). In these cases, the Second Circuit (over a vigorous dissent), *Rybicki*, 354 F.3d at 131; see also *id.* at 155-65 (Jacobs, J., joined by Walker, Jr., C.J., and Cabranes and Parker, J.J., dissenting), and the Eleventh Circuit, *Horton*, 272 F.3d at 1330, both have concluded that *Salerno* remains the governing standard, whereas the Seventh Circuit, in a related context, has declined to follow *Salerno* in light of conflicting and more recent precedent from this Court, *Newman*, 305 F.3d at 687. There can be no question that the issue presented is a recurring one that can only be resolved by this Court, and that it should be decided to provide necessary guidance to federal and state courts. Absent a uniform, nationwide standard, litigants from across the country will be subject to irreconcilable rulings based not on the underlying merits of their claims but instead on the fortuity of where they brought suit.

What is more, this case presents an appropriate vehicle for resolving this conflict because the court of appeals squarely rejected petitioners' vagueness challenge under the "all-or-nothing" standard reflected in *Salerno*, and made clear that the Ninth Circuit would continue to apply *Salerno* (rather

than *Morales*) until directed to do otherwise by this Court. Ordinance No. 12136, like the ordinance in *Morales*, imposes criminal sanctions on private individuals engaging in wholly innocent conduct and vests substantial discretion in law enforcement officials to determine whether a violation of the ordinance has occurred. Specifically, to avoid a criminal sanction, private individuals must affirmatively ensure that no "nuisance" conduct occurs on or in close proximity to their property. As in *Morales*, private individuals can be subjected to criminal sanction, without any finding of *mens rea*, for simply standing around and doing nothing. Indeed, to avoid criminal sanction, owners and operators of hotels and motels have the impossible affirmative burden of ensuring that no "nuisance" activity occurs not only on their property, but also on the property of others deemed to be in "close proximity" to a hotel or motel.

THE DECISION BELOW WARRANTS FURTHER REVIEW BY THIS COURT BECAUSE IT IMPLICATES AN ISSUE OF RECURRING NATIONAL IMPORTANCE CONCERNING THE APPROPRIATE STANDARDS THAT APPLY TO A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF A GOVERNMENT ENACTMENT.

The decision below warrants certiorari because it implicates an exceedingly important issue of federal law that demands uniform treatment throughout the country. Specifically, review of this case is necessary to resolve the dispute that has emerged as a result of conflicting pronouncements by this Court as to the standard for assessing a facial challenge to the constitutionality of a government enactment. The divergent rules advanced in *Salerno* and *Morales* have resulted in significant confusion among the federal courts of appeals. Moreover, this case implicates that conflict because the ordinance at issue here could not pass muster under *Morales*. It criminalizes a broad swath of purely innocent conduct and vests virtually unlimited discretion in law enforcement

officials to determine whether a property owner's failure to prevent nuisance activity (of which he or she may have no knowledge) constitutes a violation of the ordinance.

A. This Court's Decisions Reflect Competing Standards That Have Been Applied To Resolve Facial Challenges To Government Ordinances That Are Claimed To Be Unconstitutional.

This Court has set forth competing standards to resolve facial challenges to statutes that are claimed to violate the United States Constitution. On the one hand, in *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the Court provided that, outside of the First Amendment context, a facial challenge can succeed only when the challenger establishes that "no set of circumstances" exists under which the ordinance or law would be valid. On the other hand, the Court in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), held that a city ordinance was unconstitutionally vague on its face without making a determination whether the ordinance was vague in every application. *Id.* at 60-61. Moreover, a plurality of the Court adopted a different standard based on various factors: whether the challenged law (1) involved criminal penalties, (2) contained a *mens rea* requirement, and (3) implicated constitutionally protected conduct. *Id.* at 55 (Stevens, J.). Consequently, *Salerno* and *Morales* have left the courts of appeals to guess which of these competing standards should be applied to resolve facial challenges to government enactments.

The question of what standard should be applied to resolve a facial challenge to a government enactment is a recurring one that has been treated on a number of occasions by this Court. For example, prior to *Salerno*, in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 505 (1982), this Court held that an ordinance regulating the sale of drug paraphernalia was not unconstitutionally vague on its face. Reversing the court of appeals, which struck down the law because it was "unclear in *some* of its applications," *id.* at

495, the Court explained that a successful facial challenge to a law that *does not* reach constitutionally protected conduct requires "the complainant [to] demonstrate that the law is impermissibly vague in *all* of its applications." *Id.* at 497 (emphasis added). The Court distinguished this inquiry from an overbreadth challenge, which would apply to a law that reaches a substantial amount of "constitutionally protected conduct." *Id.*

The Court departed from this standard in *Kolender* v. *Lawson*, 461 U.S. 352 (1983), where the Court held that an anti-loitering statute was unconstitutionally vague on its face. *Id.* at 361. In doing so, the Court rejected the notion that a statute could not be held "'unconstitutionally vague on its face unless it is vague in all of its possible applications.'" *Id.* at 358 n.8. Rather, the Court stated that a criminal statute might be facially invalid even if it conceivably had some valid application because "the standard of certainty is higher" where criminal penalties are involved. *Id.*

In *Salerno*, the Court reverted back to the approach adopted in *Hoffman Estates* by ruling that to prevail in a facial challenge to a legislative enactment, "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745 (citation omitted). Accordingly, the "fact that [the statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

Salerno itself involved a facial challenge to the constitutionality of the Bail Reform Act, which allowed courts "to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *Id.* at 741 (quoting 18 U.S.C. § 3142(e) (1982 & Supp. III 1985)). The law was challenged as facially violative of the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment. *Id.*

at 746. The Court held that, on its face, the Bail Reform Act did not violate the Fifth Amendment because it contained sufficient procedural safeguards to satisfy due process, and it did not violate the Eighth Amendment because it was directed toward a compelling interest different than the concern of the Excessive Bail Clause. *Id.* at 751, 754.[3]

The *Salerno* standard, however, has been the subject of much debate within the Court. For example, in *Washington* v. *Glucksberg*, 521 U.S. 702, 740 (1997), Justice Stevens, concurring in the judgment, argued that the Court has never actually applied *Salerno*'s strict standard, not even in *Salerno* itself. *Id.* at 739 (Stevens, J., concurring in judgment) (stating that application of *Salerno* standard is "the subject of debate within this Court"). Conversely, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, have expressed their view that the applicability of the *Salerno* standard for facial challenges is an issue that "cries out for [the Court's] review." *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of petition for certiorari).[4]

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[3] *Salerno*'s "no set of circumstances" standard for facial challenges has been followed in subsequent decisions of this Court. *See, e.g.*, *Anderson* v. *Edwards*, 514 U.S. 143, 155-56 n.6 (1995); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993); *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11-12 (1988).

[4] *See also Janklow*, 517 U.S. at 1175-76 (Stevens, J., respecting the denial of the petition for certiorari) (calling the *Salerno* standard "draconian . . . dictum" that was "unsupported by citation or precedent" and does not accurately characterize the standard for facial challenges). Both lower courts and legal scholars have noted the disagreement regarding the appropriate standards for resolving such claims. *E.g.*, *Amfac Resorts, L.L.C.* v. *United States Dep't of Interior*, 282 F.3d 818, 826 (D.C. Cir. 2002) (noting debate among Justices regarding whether *Salerno* is controlling), *vacated on other grounds*, *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior*, 538 U.S. 803 (2003); *Fla. League of Prof. Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 459 (11th Cir. 1996) (noting "disagreement

The debate about the applicability of *Salerno* to facial challenges to government enactments culminated in *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). In *Morales*, a municipal ordinance that prohibited "criminal street gang members from loitering with one another or with other persons in any public place," *id.* at 45-46 (internal quotation omitted), was challenged as unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment, *id.* at 46. A majority of the Court invalidated the anti-loitering ordinance as unconstitutionally vague on its face even though the Court did not conclude that the ordinance would be invalid in every application. *Id.* at 60-61. Although *Morales* generated a number of concurring opinions, a majority of the Court joined Section V of Justice Stevens' opinion to strike down the anti-loitering statute because it "reach[es] a substantial amount of innocent conduct" but fails to "'establish minimal guidelines to govern law enforcement,'" *id.* at 60 (quoting *Kolender*, 461 U.S. at 358).

Justice Stevens, writing for the plurality, went further by both rejecting and distinguishing *Salerno*:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . .
>
> We need not, however, resolve the viability of *Salerno*'s dictum because this case comes to us from a state—not a federal—court.

Id. at 55 n.22. The plurality characterized the *Salerno* standard as a species of third-party standing that state courts need not apply. *Id.* The plurality acknowledged that

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has appeared lately among members of the Supreme Court on exactly how high the threshold for facial invalidation should be set"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239 (1994) (arguing that the Court has applied the *Salerno* standard inconsistently and has failed to articulate why it departs from *Salerno*).

prohibiting certain conduct, like intimidation of residents, would be constitutional, but stated that "[u]ncertainty about the scope of that *additional* coverage" of the ordinance provided the basis for the vagueness claim. *Id.* at 52 (emphasis added). Instead of applying *Salerno*'s "no set of circumstances" standard, the plurality adopted yet another standard for assessing facial challenges: a facial challenge was appropriate because the ordinance was a criminal law that lacked a *mens rea* requirement and infringed on constitutionally protected rights. *Id.* at 55. Specifically, the plurality explained that the "right to remove from one place to another according to inclination" was constitutionally protected. *Id.* at 53 (internal quotation omitted). The plurality explained that "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.

Justice O'Connor, concurring in part and concurring in the judgment, agreed that the statute was unconstitutionally vague because, as interpreted by the Illinois Supreme Court, it lacked guidelines to prevent arbitrary and discriminatory enforcement. *Id.* at 64-65. Similarly, Justice Kennedy concurred in the judgment because the ordinance lacked sufficient guidelines for enforcement. *Id.* at 69-70. Justice Breyer, for his part, concurred in the judgment, explaining that the ordinance was invalid "because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* at 71.

In dissent, Justice Scalia argued that the majority should have applied the *Salerno* standard for facial challenges. *Id.* at 77-81. Justice Scalia admitted that the Court had adopted exceptions to *Salerno*, such as in *Romer* v. *Evans*, 517 U.S. 620 (1996), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), but he argued that no similar exception should apply in *Morales*. 527 U.S. at 81. Justice Scalia explained that, under *Salerno*, the challengers would have to prove that the law is invalid in all of its applications, which could be

defeated by the existence a single valid application. *Id.* Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, also wrote separately in dissent to explain that isolated instances of arbitrary and discriminatory law enforcement were insufficient to meet *Salerno*'s standard for facial challenges. *Id.* at 111.

Simply put, the appropriate standard for resolving a facial challenge to the constitutionality of a government enactment is "an important question of federal law that has not been, but should be, settled by this Court." See Sup. Ct. R. 10(c). On the one hand, under *Salerno*, a facial challenge cannot succeed unless the challenger shows that "no set of circumstances exists under which the [statute] would be valid." *Salerno*, 481 U.S. at 745. Under *Morales*, however, where a criminal statute with no *mens rea* requirement infringes on constitutionally protected conduct, broadly described, the statute may be ruled facially invalid if it "reach[es] a substantial amount of innocent conduct." 527 U.S. at 60 (opinion of Court).

Based on the decision in *Morales*, the continued applicability of the *Salerno* standard to facial challenges is in question, especially in the context of criminal statutes that lack a *mens rea* requirement and that implicate constitutionally protected conduct. This case presents the doctrinal split clearly and directly and therefore the Court should grant the petition for certiorari.

B. The Appropriate Standard For Resolving Facial Challenges Has Been A Source Of Significant Confusion Among The Courts Of Appeals.

Because of this Court's conflicting decisions in *Salerno* and *Morales*, the federal courts of appeals have lacked dispositive guidance as to the proper standard for facial challenges to the constitutionality of government ordinances, and as a result, widespread confusion has resulted. The varying approaches

taken by the federal courts of appeals and other lower courts underscore the need for further review by this Court.

For example, in *United States* v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), the Second Circuit openly struggled in determining which standard to apply to a facial challenge of a statute. At issue in *Rybicki* was a statute that extended the coverage of the wire and mail fraud statutes to include deprivation of the "intangible right of honest services." *Id.* at 126 (internal quotation omitted). The en banc court highlighted that "there is disagreement as to the nature" of review of "facial vagueness challenges outside the First Amendment context." *Id.* at 131. Specifically, the Second Circuit explained that in *Morales*, the "Court struck down an anti-loitering statute as facially unconstitutional without first considering whether the statute was unconstitutionally vague as applied to the facts of the case or whether any set of circumstances existed in which the statute would be valid." *Id.* The en banc court acknowledged that "[a]lthough panels of [the Second Circuit] have noted that *Morales* may have rejected the *Salerno* dicta, we have not concluded that a majority of the Supreme Court has done so." *Id.* Ultimately, the en banc court ruled that the statute in question was "sufficiently clear to survive a facial challenge under either *Morales* or *Salerno*." *Id.* at 131-32; see also *id.* at 150 (Raggi, J., concurring in the judgment) (describing the factors considered in *Morales* and concluding that the statute at issue is not "'such a law'").

Judge Jacobs, joined by Chief Judge Walker, and Judges Cabranes and Parker, dissented because "[t]he test for facial invalidity of a criminal statute was articulated by the Supreme Court in 1999: 'Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.'" *Id.* at 156 (Jacobs, J., dissenting) (quoting

Morales, 527 U.S. at 56 (opinion of Court)). After concluding that the Second Circuit was "required to apply *Morales*," Judge Jacobs and the other dissenters explained that, under *Morales*, "it is quite clear that the statute" was unconstitutional because it "imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and gives insufficient notice to defendants." *Id.* at 157.

Similarly, the Eleventh Circuit has grappled with the conflicting standards in *Salerno* and *Morales*. After *Morales*, the Eleventh Circuit described the *Salerno* rule as "subject to a heated debate in the Supreme Court, where it has not been consistently followed." *United States* v. *Frandsen*, 212 F.3d 1231, 1235 n.3 (11th Cir. 2000) (citing *Morales*, 527 U.S. at 55 n.2 (Stevens, J.)). More recently, in *Horton*, 272 F.3d at 1329-30, the Eleventh Circuit addressed a facial challenge to a municipal ordinance prohibiting street performances in a four-block area of the city's historic district. *Id.* at 1321. The court held that the ordinance was not facially invalid under *Salerno* because "circumstances exist under which it clearly would *not* be unconstitutionally vague." *Id.* at 1330. In doing so, the Eleventh Circuit recognized that "inroads into *Salerno*'s rule have developed." *Id.* As a result, the *Horton* court felt compelled to analyze the challenged ordinance under both the *Salerno* and *Morales* standards. *Id.* at 1330-31.

In contrast, in a related context, the Seventh Circuit has declined to follow *Salerno* because it is inconsistent with subsequent precedent from this Court. See *Newman*, 305 F.3d at 687. There, the court of appeals upheld a state statute regulating abortion against a facial challenge. *Id.* at 693. In doing so, the court of appeals, through Judge Easterbrook, noted that it was presented "with irreconcilable directives from the Supreme Court" regarding the appropriate standard to apply to a facial challenge to state regulation. *Id.* at 687. The court of appeals highlighted its dilemma: "We cannot follow *Salerno* without departing from the approach taken [in

more recent decisions]; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court to follow decisions on the books." *Id.* In the end, the Seventh Circuit concluded that *Salerno*'s discussion of the standards for a facial challenge was "not essential to *Salerno*'s judgment" and therefore the court of appeals would follow the more recent holding of this Court. *Id.*

The Ninth Circuit likewise has discussed the confusion resulting from the differing standards set forth in *Salerno* and the more recent decision in *Morales*. See Pet. App. 16a-19a. In this case, the court recognized that *Morales* has "cast some doubt on the 'no set of circumstances' requirement." *Id.* at 17a. However, the court of appeals refused to depart from the *Salerno* standard, stating: "Until a majority of the Supreme Court directs otherwise, a party challenging the facial validity of an ordinance on vagueness grounds outside the domain of the First Amendment must demonstrate that 'the enactment is impermissibly vague in all of its applications.'" *Id.* at 19a (quoting *Hoffman Estates*, 455 U.S. at 495). See also *S.D. Myers, Inc.* v. *City & County of S.F.*, 253 F.3d 461, 467-68 (9th Cir. 2001). Consequently, the court held that the ordinances at issue were facially valid because the challengers failed to allege or show that the ordinances were impermissibly vague in all applications. Pet. App. 19a-21a.[5]

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[5] Federal district courts and state courts have also struggled with this issue. In *Mineral Policy Center* v. *Norton*, 292 F. Supp. 2d 30, 40 (D.D.C. 2003), the court declined to apply *Salerno* to a claim that a federal mining regulation was, on its face, contrary to the Federal Land Policy and Management Act. The court stated that "confusion in this Circuit remains" regarding the applicability of *Salerno* and that "other courts have also wrestled with the *Salerno* standard." *Id.* at 39. Describing "the Supreme Court's application of *Salerno* [as] spotty, at best," the court was "left with little to guide it." *Id.* *See also United States* v. *Sampson*, 275 F. Supp. 2d 49, 58 (D. Mass. 2003) (finding that the "dicta from *Salerno*" did not provide the proper test for deciding whether the Federal Death Penalty Act was facially unconstitutional).

This confusion has generated significant discussion from legal commentators, who have underscored the conflict among the decisions of this Court. Scholars have debated whether or not *Salerno* actually provides the standard for addressing facial challenges. Professor Matthew D. Adler, in *Rights, Rules, and the Structure of Constitutional Adjudication*, 113 Harv. L. Rev. 1371, 1390 (2000), identified and analyzed the tension between the *Salerno* standard and the Court's actual pattern of facial invalidation, and argued that this tension reflects a "continuing and vigorous disagreement" on the Court about the meaning and correctness of the *Salerno* standard. See also Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322 (2000) (noting the development of a debate in the Court about the necessary conditions for facial challenges to prevail). Similarly, Professor Michael C. Steel argued that the *Salerno* standard cannot be reconciled with either the *Kolender* or the *Morales* decision. See *Constitutional Law—The Vagueness Doctrine: Two-Part Test, or Two Conflicting Tests? City of Chicago v. Morales, 119 S. Ct. 1849 (1999)*, 35 Land & Water L. Rev. 255, 271 (2000).

In the end, there can be no question that there is substantial confusion among the lower courts regarding the appropriate standard that should be applied in resolving a claim that a government enactment is facially invalid. The confusion engendered by this Court's decisions in *Salerno* and *Morales* can only be corrected this Court and thus cries out for a clear ruling on this issue.

Similarly, state courts of highest resort have rejected the *Salerno* standard for facial challenges to certain categories of state enactments. *See, e.g.*, *Caterpillar Inc.* v. *N.H. Dep't Revenue Admin.*, 741 A.2d 56 (N.H. 1999) (declining to apply the *Salerno* standard to a facial challenge to a state tax statute); *Caterpillar, Inc.* v. *Comm'r of Revenue*, 568 N.W.2d 695 (Minn. 1997) (same); *Conoco, Inc.* v. *Taxation & Revenue Dep't*, 931 P.2d 730 (N.M. 1996) (same).

C. This Case Is An Appropriate Vehicle For Resolving The Conflict And Confusion Reflected In This Court's Decisions And In The Decisions Of Lower Courts.

This case presents an appropriate vehicle for resolving the confusion and conflict that have resulted from this Court's competing pronouncements as to the standards applicable to facial challenges to government enactments. In this case, the court below recognized that there were two competing standards for a facial challenge to a government ordinance: "[*Morales*] has cast some doubt on the 'no set of circumstances' requirement." Pet. App. 17a. The court then expressly applied *Salerno* to the case at hand. *Id.* at 19a. The court confirmed that "[u]ntil a majority of the Supreme Court directs otherwise" it will apply the *Salerno* standard to facial challenges outside of the First Amendment context. *Id.*

What is more, the court below never purported to apply fully the standards adopted by the majority in *Morales*, because, if it had, the outcome surely would have been different. With regard to Ordinance No. 12136, the court found that the Association "fails to allege that every (or any) application of that provision would qualify as unconstitutionally vague." Pet. App. 19a. Similarly, the court found that the Association did not allege that Ordinance No. 12137 "is impermissibly vague in all of its applications." *Id.* at 21a.

The court did state that "even if the all-or-nothing principle were inapplicable, the Association's challenge cannot succeed." *Id.* at 19a. However, the court of appeals did not actually apply the *Morales* standard in full. In its discussion of Ordinance No. 12126, the court suggested that the ordinance provides sufficient notice of the prohibited conduct and gives law enforcement sufficient guidance to avoid discriminatory and arbitrary enforcement. Pet. App. 19a-20a. But this discussion was limited to the court's analysis of the phrase "close proximity." *Id.* Likewise, in its discussion of

Ordinance No. 12137, the court dismissed the idea that the absence of a *mens rea* requirement in a criminal statute could be a determinative factor in determining facial vagueness. *Id.* at 20a-21a.

Under *Morales*, the governing inquiry is whether the ordinance "reach[es] a substantial amount of innocent conduct" but fails to "'establish minimal guidelines to govern law enforcement,'" 527 U.S. at 60 (quoting *Kolender*, 461 U.S. at 358). Here, there can be no question that the first prong is satisfied. In effect, the owners and operators of hotels and motels in the city of Oakland are conscripted by the ordinance to police "nuisances" not only on their own property, but in areas deemed by law enforcement officials to be in close proximity to their property. Accordingly, hotel and motel owners are subject to criminal penalties if conduct by third persons that qualifies as a "nuisance" occurs on or in "close proximity" to their property. In other words, if nuisance activity occurs on or in close proximity to their property, property owners or operators may be held criminally liable even if they are wholly unaware of that conduct. Just as the ordinance in *Morales* was defective because it subjected broad swaths of innocent conduct to criminal sanction, here too the challenged ordinances subject property owners to criminal prosecution for failing to eliminate nuisance conduct of which they may be unaware and over which they may have absolutely no control.

Second, the ordinance gives law enforcement officials unbridled discretion to interpret whether the operation of a hotel "results in" or "contributes to" nuisance activity. Presumably, an officer will not be able to make this determination based on any personal knowledge or observation of the internal workings of the hotel, which are not necessarily visible to the public. Instead, the officer will infer a violation based on the existence of a nuisance activity. As was the case in *Morales*, the ordinance provides "absolute discretion" to decide what activities constitute a violation. *Id.*

at 61 (internal quotation omitted). This type of standardless discretion permits and even encourages arbitrary and discriminatory enforcement of the ordinance. Thus, in effect, the owners and operators of hotels and motels will be held criminally responsible for all nuisance activity on or near their property, whether or not the operation of their property has caused or contributed to such activity.

Taken together, the ordinances at issue, and specifically Section 8.03.120(A) of Ordinance No. 12136, are unconstitutionally vague. First, a virtually impossible burden is imposed on individuals seeking to conform their conduct to the requirements of the ordinance. Although the ordinance lists examples of nuisance activity, it expressly states that the list is not comprehensive. More importantly, the ordinance requires that the operation of a hotel property not "result in" or "contribute to" nuisance activity on or in close proximity to the property. Like the ordinance in *Morales*, this ordinance is vague because "'no standard of conduct is specified at all.'" 527 U.S. at 60 (quoting *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971)).

In addition, the formulation by the *Morales* plurality further makes clear that a law may be unconstitutionally vague on its face if it (1) involves criminal penalties, (2) lacks a *mens rea* requirement, and (3) implicates constitutionally protected conduct. *Id.* at 55 (Stevens, J.). "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* The ordinances at issue here suffer from the same defects as the ordinance struck down in *Morales*. First, Ordinances No. 12136 and No. 12137 establish criminal penalties for violations of the operating standards for hotels and motels as amended by Ordinance No. 12136. See Pet. App. 63a, 81a. Second, neither ordinance includes a *mens rea* requirement. Specifically, Section 8.03.120(A) of Ordinance No. 12136, which requires that "[t]he operation of the property shall not result in repeated nuisance activities on the property or contribute to nuisance activities in close proximity to the

property," lacks any scienter requirement. *Id.* at 62a. Third, the ordinance implicates the constitutionally protected right to earn a living. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 572 (1972) (the liberty guaranteed by the Fourteenth Amendment includes "'the right of the individual . . . to engage in any of the common occupations of life'") (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). Because the ordinances satisfy these three elements from *Morales*, the court should have inquired whether vagueness "permeates" the text of the ordinances.

In sum, had the court below applied the *Morales* standard instead of the *Salerno* standard, it could not have upheld the dismissal of petitioners' facial vagueness claim.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 1, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-15220

HOTEL & MOTEL ASSOCIATION OF OAKLAND; Balu K. Patel; Usha B. Patel; Navin Patel; Tara N. Patel; Bharat Patel; Niketa Patel, Parsottam B. Patel; Gita Patel; Vinod P. Patel; Madhuben V. Patel; Jagdish Patel; Bharti J. Patel; Ramesh D. Patel; Thakorbhai G. Patel; Manjuben T. Patel; Kirit S. Patel; Ranjan K. Patel; Manubhai L. Patel; Shardaben M. Patel; Pravin Patel; Sima Patel; Natwarbhai Patel; Jagdishkumar B. Patel; Jayeshkumar D. Patel; Hasmukh B. Patel; Bhisma Patel; Babubhai K. Patel; Kalaben B. Patel; Vallabh H. Patel; Jamanaben V. Patel; Ranchodbhai D. Patel; Parbhubhai V. Patel; Kamuben P. Patel; Govindbhai Z. Patel; Madhuben G. Patel; Jotindra Patel; Rekha J. Patel; Dilip P. Patel; Kalpana D. Patel; Anil P. Kumar; Sunita A. Kumar; Rajendra K. Kalyan; Pushpa R. Kalyan; Bhupendra K. Kalyan; Bhartiben B. Kalyan; Narbada Kalyan Kalyan; Harish Sharma; Naresh Patel; Bobby Newman,

Plaintiffs-Appellants,

v.

CITY OF OAKLAND, a municipal corporation; City of Oakland Police Department; City of Oakland Police Officer D. Martinez Sued As Doe 1; City of Oakland Police Officer T. Martin Sued as Doe 2; Oakland Housing Inspector Ronald Abab sued as Doe 3; City Housing Inspector Gerald Donahue Sued as Doe 4,

Defendants-Appellees.

Argued and Submitted April 10, 2003.
Filed Sept. 17, 2003.

Appeal from the United States District Court for the Northern District of California; Thelton E. Henderson, District Judge, Presiding. D.C. No. CV-99-03758-THE/JCS.

Before NOONAN, McKEOWN, and RAWLINSON, Circuit Judges.

OPINION

McKEOWN, Circuit Judge.

This case arises from a constitutional challenge to a pair of city ordinances that place maintenance and habitability restrictions on hotels, motels, and rooming houses ("hotels") located in Oakland, California. One ordinance requires all hotels to comply with certain maintenance, habitability, security and record-keeping standards. The other ordinance reclassifies those hotels with so-called "non-conforming use" status to "Deemed Approved" status, and requires Deemed Approved hotels to comply with the new standards in order to retain that status. Appellants, the owners and operators of various Oakland hotels as well as their trade association, challenge the ordinances as an unconstitutional taking under the Fifth Amendment. They also claim that the ordinances violate their Fourteenth Amendment rights to procedural due process and equal protection and are unconstitutionally vague. We conclude that the ordinances pass constitutional muster and thus affirm the district court's dismissal of the action.

BACKGROUND

In spring of 1999, the Oakland City Council enacted two ordinances for the express purpose of improving the physical conditions in and around hotels within Oakland. The Council

had found over the preceding several years a continuing pattern of illegal activity, including prostitution and drug use, associated with many hotels that were poorly maintained. Steps to control the problem activities, including increased policing and the filing of civil abatement actions by the City Attorney, resulted in little success. The Council concluded that regular maintenance and adequate property management would lead to better outcomes.

The first of these ordinances, Ordinance No. 12136, amends the Oakland Municipal Code ("OMC") to add Chapter 8.03 ("Operating Standards for Hotels, Motel[sic] and Rooming Houses"),[1] which sets forth in detail various regulations with respect to housekeeping conditions, property security, and prevention of criminal and nuisance activity.[2] The ordinance also amends Chapter 5.34 of the OMC to add specific record-keeping requirements relating to guest receipts.

The companion measure, Ordinance No. 12137, amends the Oakland Planning Code ("OPC") to create a "Deemed Approved Hotel Program" at Chapter 17.157. The ordinance reclassifies as "Deemed Approved Hotel Activities" all of

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[1] The terms "hotel" and "rooming house" are defined by statute. *See* OMC § 8.03.040. A "hotel" is "any public or private space or structure for living therein, including but not limited to any: inn, hostelry, tourist home or house, motel rooming house, mobile home or other living place within the city, offering the right to use such space for sleeping or overnight accommodations. . . ." OMC § 4.24.020. The term "rooming house" is defined by the Oakland Planning Code ("OPC") to include certain buildings accommodating guests on a weekly or longer basis as well as those accommodating "partly on a weekly or longer basis and partly for a shorter time period. . . ." OPC §§ 17.10.690, 17.10.110, 17.10.120.

[2] Specifically, Chapter 8.03 contains individual subsections covering: management practices, inspection of records and facilities, property security, housekeeping conditions in excess of normal "wear and tear," room furnishings, exterior of property, common areas, and criminal and nuisance activity.

those hotels that previously had "legal nonconforming use" status[3] and requires that Deemed Approved hotels comply with the new performance standards established by Ordinance No. 12136. Failure to abide by the new performance standards constitutes an infraction, and may result in misdemeanor prosecution, fines, and enforcement actions. OPC § 17.157.180. Violations may ultimately lead, after a public hearing and administrative review, to revocation of a hotel's Deemed Approved status. OPC § 17.157.120.

The Hotel & Motel Association of Oakland and a number of individual hotel owners and operators (collectively the "Association") brought this action challenging the ordinances under both the United States and California Constitutions. After various interim rulings in which the district court dismissed certain of the Association's claims, the parties agreed to a Stipulation and Judgment of Dismissal, which was entered by the district court. Under the Stipulation and Judgment of Dismissal, certain claims were "dismissed with prejudice with no right of appeal," while the remaining claims were "preserved for appeal."

As a result of these proceedings, the only claims remaining on appeal are: a claim alleging an unconstitutional taking of property under the Fifth Amendment, claims alleging violations of the procedural Due Process and Equal Protection clauses of the Fourteenth Amendment, and a facial challenge alleging that the Oakland ordinances are unconstitutionally vague.

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[3] Under California law, "[a] legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter." *Hansen Bros. Enters., Inc. v. Board of Supervisors*, 12 Cal.4th 533, 540 n. 1, 48 Cal.Rptr.2d 778, 907 P.2d 1324 (Cal.1996).

DISCUSSION

I. JURISDICTION

Although the parties did not question appellate jurisdiction, we raised the issue sua sponte and requested supplemental briefing. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir.1997) (en banc) ("[W]e have raised [the question of jurisdiction] sua sponte, as we must."). Our concern arose because of the posture of the district court's initial order granting in part the City's Rule 12(b)(6) motion to dismiss. Some of the claims addressed by the order were dismissed "without prejudice," and it was not clear from the parties' initial briefing whether the court had entered a final judgment dismissing the action in its entirety.

"A ruling is final for purposes of [28 U.S.C.] § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir.1997) (internal quotation marks omitted). The record before us demonstrates that the district court intended to dismiss the action in its entirety after an adjudication of all the issues, despite the fact that some claims were originally dismissed without prejudice. By its terms, the Stipulation and Judgment of Dismissal signed by the district court served as an "entry of dismissal of the . . . action." The procedural history leading up to that order documents the court's intent. After several of the claims in the First Amended Complaint were dismissed without prejudice, the Association reincorporated those claims in a Second Amended Complaint. Following the court's subsequent order granting judgment on the pleadings as to the Second Amended Complaint, the only claims that remained were a Fourth Amendment claim brought by individual plaintiffs against the City and an Equal Protection claim based on discriminatory intent. Both claims were dismissed with prejudice with no right of appeal in the Stipulation and

Judgment of Dismissal. Accordingly, the district court's dismissal of the action constituted a reviewable final decision and we have jurisdiction pursuant to 28 U.S.C. § 1291. *See De Tie v. Orange County*, 152 F.3d 1109, 1111 (9th Cir.1998) ("[D]ismissal of an *action*, even when it is without prejudice, is a final order." (emphasis added)).

II. FIFTH AMENDMENT TAKINGS CHALLENGE

We first address the facial takings claim brought under the Takings Clause of the Fifth Amendment. "A facial challenge involves a claim that the mere enactment of a statute constitutes a taking," and is to be distinguished from an "as applied" challenge, which "involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir.1993) (citation and internal quotation marks omitted). The Association, which faces an "uphill battle" in bringing this facial attack, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), urges that the mere enactment of Ordinance No. 12137 constituted a "regulatory taking" of property by the City.

As we have explained previously, "[a] regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property." *Levald*, 998 F.2d at 684. In contrast to condemnations and physical takings, which find their origin in the plain language of the Fifth Amendment, regulatory takings are "of more recent vintage" in the Supreme Court's jurisprudence and do not easily lend themselves to the straightforward application of set formulas and categorical rules. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). Nevertheless, "the contours have been established: a land use regulation does not con-

stitute a taking if the regulation does not deny a landowner all economically viable use of the property and if the regulation substantially advances a legitimate government interest." *Buckles v. King County*, 191 F.3d 1127, 1140 (9th Cir.1999).

The district court appropriately rejected as "unripe" the Association's contention that its members are being denied economically viable use of their land. "Under our precedents, a facial takings claim alleging the denial of the economically viable use of one's property is unripe until the owner has sought, and been denied, just compensation by the state." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir.1998). This jurisdictional predicate is grounded in the text of the Fifth Amendment and in the Supreme Court's admonition that "no constitutional violation occurs until just compensation has been denied." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n. 13, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). As the district court correctly pointed out, nowhere in its pleadings does the Association aver that it has pursued state administrative or judicial remedies to seek just compensation. Accordingly, the takings claim, insofar as it alleges a denial of economically viable use, is unripe for review.[4]

The Association also pursues an alternative facial taking theory, namely that Ordinance No. 12137 does not substantially advance a legitimate state interest. The just compensation ripeness requirement does not apply to this claim, as it does not depend on the extent to which the

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[4] As we noted in *San Remo Hotel*, this ripeness requirement does not apply "where the state does not have a 'reasonable, certain, and adequate provision for obtaining compensation' at the time of the taking, in which case the facial takings claim is instantly ripe." 145 F.3d at 1101-02 (quoting *Williamson County*, 473 U.S. at 194, 105 S.Ct. 3108). But the Association cannot avail itself of this exception as "we have expressly held that, post-1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim." *Id.* at 1102.

Association was compensated. *See Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir.1996) (citing *Yee v. City of Escondido*, 503 U.S. 519, 533-34, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992)). Rather, the claim is based on the assertion that the municipality never had constitutional authority to adopt the ordinance, regardless of any compensation that might be offered. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 385 (9th Cir.2002), *cert. denied,* 537 U.S. 973, 123 S.Ct. 466, 154 L.Ed.2d 329 (2002). We therefore address this claim on the merits.

The Association's central contention is that whether the challenged ordinances substantially advance a legitimate state interest presents a factual question incapable of resolution on a motion to dismiss prior to discovery. The Association relies heavily on language by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), where the Court characterized regulatory takings cases as "essentially ad hoc, factual inquiries." The Association argues that because it has alleged that there is neither specific evidence of a legitimate government purpose nor any evidence that the regulation is reasonably related to such a purpose, the district court was premature in dismissing its claim.

The Association's reading of the regulatory takings jurisprudence, as well as the record in this case, is unduly restrictive. The Supreme Court phraseology seized upon by the Association does not stand for the position that every inquiry into the appropriateness of a regulation's purpose or adopted means of implementation requires the development of a sophisticated factual record or, as the argument implies, resolution by a jury. Far from it. As the Court recently explained in *Tahoe-Sierra*, "ad hoc, factual" determinations frequently arise in regulatory takings cases because these cases, unlike those involving physical appropriation or condemnation (where the fact of a taking is typically obvious

or undisputed), do not easily lend themselves to broad categorical rules. 535 U.S. at 321-326 & n. 17, 122 S.Ct. 1465. Regulatory takings claims, in short, do not easily fit into a pre-ordained construct or little box; individualized scrutiny of such claims does not foreclose resolution on a motion to dismiss or a motion for summary judgment.

Our decision in *Buckles* is instructive. In that case, landowners whose property was redesignated for residential use argued that whether the decision substantially advanced a legitimate government interest was a jury question incapable of resolution on summary judgment. 191 F.3d at 1140. Following the district court's dismissal of the case, the Supreme Court decided *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), in which the Court approved of a trial court's decision to let a jury decide whether, in light of the context and history of the development application process, a city's decision to reject a particular development plan substantially advanced a legitimate state purpose. We rejected the broad reading of *Del Monte Dunes* urged by the landowners and concluded that the Supreme Court did not intend to "swallow long-standing summary judgment principles and always require a jury trial to determine whether the government's interests were legitimate and substantial." *Buckles*, 191 F.3d at 1140.

We decline to adopt the remarkable position that determining whether an ordinance, on its face, substantially advances a legitimate state interest can never be decided on a motion to dismiss. We also reject the Association's position that the record before us is not sufficiently developed to warrant disposition at this stage. *See Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (looking to the state's justifications provided in the statute to conclude zoning ordinances substantially advanced legitimate interests).

Although the Association's takings challenge is directed to Ordinance No. 12137 and whether it advances a legitimate state interest, it is useful to discuss the ordinances in tandem. Both ordinances are supported by the same legislative findings and are intended to dovetail one another in enforcement. The ordinances, on their face, are directed toward protecting the health and welfare of citizens and visitors in Oakland. Based on legislative findings, the ordinances target an increasing concentration of illegal activity, unsanitary and dangerous conditions, and a variety of nuisances associated with problem hotels. The purpose is undeniably legitimate, *see Keystone Bituminous Coal*, 480 U.S. at 492, 107 S.Ct. 1232 (explaining that the "public interest in preventing activities similar to public nuisances is a substantial one" that rarely results in a taking), and the means chosen substantially advance that purpose.

A review of the ordinances and the extensive legislative findings reveals that the City documented the problems, undertook various approaches and efforts to abate the illegal activity and unsanitary conditions, and ultimately concluded that Ordinance Nos. 12136 and 12137 were in the "best interest" of the community. For example, the City Council found that the existing housing code did not address the problems and that the police spent inordinate time and resources policing certain businesses. Further, the problem businesses allowed open use of their property for drug and prostitution activity and took minimal action to curb this activity. The City also documented safety, security, health, and other hazards and, notably, concluded that "there is a correlation between high levels of drugs and prostitution activity and the existence of substandard and public nuisance conditions at the problem properties."

Ordinance No. 12136 institutes basic maintenance, housekeeping, and security regulations applicable to all hotels. Recognizing that civil abatement actions and other attempts

to improve conditions were unsuccessful in the past, and that few legal nonconforming businesses have revocable land use permits, Ordinance No. 12137 takes the further step of refashioning nonconforming use status such that continued operation is conditioned on a business's compliance with the new regulations. A reasonable relationship exists between this regulatory action and the public purpose it is meant to serve. Thus, the ordinance substantially advances a legitimate government interest. *See Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir.2000) (discussing *Del Monte Dunes* and explaining that a "challenged regulatory action 'substantially advances' its interest if it bears a reasonable relationship to that interest.").

The Association also raises the concern that Oakland's new ordinances were enacted against the backdrop of existing statutory protection for nonconforming uses. OPC § 17.114.040, in effect at the time the ordinances were enacted, generally allows a nonconforming use to be continued and maintained indefinitely and the rights to such use run with the land.[5] According to the Association, Ordinance No. 12137 effectively extinguishes the nonconforming use guarantees of that provision.

But Oakland's new regulation does nothing of the sort. Nothing in Ordinance No. 12137 suggests that the redesignation of properties from "non-conforming" to "Deemed Approved" status has any effect on the conditional guarantees in Ordinance No. 12137 or any other statutory provisions applying to what were formerly known as legal noncon-

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[5] Section 17.114.40 provides, in relevant part: A nonconforming use which is in existence on the effective date of the zoning regulations or of any subsequent rezoning or other amendment thereto which makes such use nonconforming, and which existed lawfully under the previous zoning controls . . . may thereafter be continued and maintained indefinitely, and the rights to such use shall run with the land, except as otherwise specified in the nonconforming use regulations.

forming businesses.[6] Rather, the text of Ordinance No. 12137 mandates precisely the opposite. *See* OPC § 17.157.030(C) ("The Nonconforming Use provisions of the zoning regulations . . . shall apply to the Deemed Approved Hotel regulations."). Even if we were to accept the Association's contention that a conflict exists between Ordinance No. 12137 and § 17.114.040, there is no substantive change with respect to the Association's use of its property other than compliance with basic health and safety regulations applicable to all other hotels. *See City of Oakland v. Superior Court*, 45 Cal.App.4th 740, 757, 53 Cal.Rptr.2d 120 (1996) (upholding a similar "Deemed Approved" program for liquor stores on the ground that "[a] municipality retains the right to abate nuisances and enforce its criminal laws even in the face of grandfather rights"); *see also Bauer v. City of San Diego*, 75 Cal.App.4th 1281, 1292-95, 89 Cal.Rptr.2d 795 (1999) (discussing grandfather rights of nonconforming businesses in context of deemed approved program).

In sum, because Ordinance No. 12137 substantially advances a legitimate state interest and no other takings claim was ripe for review, we conclude that the Association's takings claims were properly dismissed.

III. PROCEDURAL DUE PROCESS CLAIM

The Association's procedural due process claim stems from a complaint that it did not receive an individualized hearing prior to the enactment of the ordinances. Whether the Association was accorded procedural due process when the new hotel regulations were enacted depends on the nature of the decision leading to the City's newly enacted regulations. Generally, if the "action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed

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[6] Section 17.114.040's guarantees are not absolute. They apply "except as otherwise specified in the nonconforming use regulations."

by law." *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir.1995) (as amended) (internal quotation marks omitted). This rule of thumb follows from the observation made by Justice Holmes almost a century ago that, even though an individual's property rights may be affected by the enactment of a general statute, "[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption." *Bi-Metallic Inv. Co. v. State Bd. of Equalization,* 239 U.S. 441, 445, 36 S.Ct. 141, 60 L.Ed. 372 (1915).

Of course, public decision-makers cannot sidestep the dictates of due process by simply giving their actions a legislative moniker. Our cases have been careful to focus on the "character of the action, rather than its label," avoiding "formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions." *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir.1990). In *Harris,* we held that, notwithstanding an action's outward appearance as a legislative act, greater procedural rights may attach where only a few persons are targeted or affected and the state's action "exceptionally affect[s]" them "on an individual basis." *Id.* at 502 (internal quotation marks omitted). By contrast, "our cases have determined also that governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individualized notice and hearing; general notice as provided by law is sufficient." *Halverson,* 42 F.3d at 1261.

The City Council's actions constituted the purest of legislative acts. Both ordinances are laws of general applicability affecting a broad geographic area and the complete range of hostelries, as opposed to one or a few individuals or establishments. Ordinance No. 12136, which sets forth a variety of operating standards, states that its provisions apply to all hotels "which provide shelter, furniture, linens, and

housekeeping services, etc. within the guest room(s) and throughout the property." OMC § 8.03.030. Ordinance No. 12137, aimed at amending the non-conforming use regulations, indicates that "[t]he Deemed Approved Hotel regulations shall apply, to the extent permissible under other laws, to *all* Legal Nonconforming Hotels and Rooming Houses within the City." OPC § 17.157.030(A) (emphasis added).

The Association seeks refuge in *Harris* by arguing that, in adopting Ordinance No. 12137, the City targeted "a relatively small number of persons" who were "exceptionally affected" on an "individual basis." 904 F.2d at 502 (internal quotation marks omitted). But the mere fact that a subcategory of hotels motivated the City Council to act does not change the legislative quality of the ordinance. Unlike in *Harris*, where a county specifically targeted a single individual's property for a zoning change after notice had been published for an area-wide plan amendment, Ordinance No. 12137 is a garden variety statute affecting an entire class of Oakland hotels. None of the allegations made by the Association, or by the forty-nine individual plaintiffs who brought this action, support the claim that one or only a few individuals were targeted or affected.

Nor were any of the members of the Association "exceptionally affected . . . on an individual basis." *Harris*, 904 F.2d at 502. Unlike in *Harris*, where the zoning decision completely altered the permissible uses of the individual's land by changing it from commercial to residential use, the ordinances effect no substantive change in the legal status of the hotels. The hotels still enjoy their non-conforming use privileges, only with a different label and with the added requirement that they abide by the most basic habitability and nuisance standards. Significantly, in the event of claimed non-compliance, a comprehensive administrative apparatus ensures that violators have the right to a noticed public hearing and an appeal. *See* OPC §§ 17.157.070-150.

When the City Council exercised its legislative functions in a lawful manner, the Association received all the process that was due. The Association's constitutional rights were "protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi Metallic,* 239 U.S. at 445, 36 S.Ct. 141. No additional individualized notice or hearing was required.

IV. EQUAL PROTECTION AND VAGUENESS CHALLENGES

The Association raises two final constitutional challenges to the Oakland ordinances: an equal protection claim and a vagueness challenge.

A. EQUAL PROTECTION

The Association's only equal protection argument on appeal is that Ordinance No. 12137, unlike its counterpart Ordinance No. 12136, impermissibly targets nonconforming hotels. Because there is no allegation that the ordinance burdens a suspect class or a fundamental interest, the City must demonstrate only that the classification scheme is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

Ordinance No. 12137 easily passes the "highly deferential" rational basis standard of review for the reasons we addressed in our analysis of the "substantially advance" requirement of the facial takings claim. *See S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir.1990); *see also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165-66 (9th Cir.1993) (concluding, in context of takings and equal protection challenges, that legislation both substantially advanced and was rationally related to legitimate state interest).

The direct links between the legislative findings and the scope of the ordinances serve to distinguish Oakland's scheme from *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the case relied upon by the Association. In that case, the Supreme Court concluded that an ordinance requiring a special use permit for homes for the mentally retarded did not pass rational basis scrutiny because it was based on irrational prejudices rather than a showing that the home would pose a special threat to the city's interests. *Id.* at 448-49, 105 S.Ct. 3249. Here, by contrast, Deemed Approved hotels are subject to the same standards as all other hotels and, to the extent that those standards are uniquely enforced as a "condition" of Deemed Approved status, there is a reasonable justification for doing so. Ordinance No. 12137, on its face, states that "few or none of the legal nonconforming businesses have land use permits with associated conditions that can be revoked for violations of the conditions or public nuisance-related activities." This enforcement dilemma underscores that, unlike the ordinance invalidated in *Cleburne*, Oakland's enforcement scheme stems not from an irrational prejudice but rather from the unique traits of the target businesses. Ordinance No. 12137 does not deny the Association equal protection. *See Board of Trustees v. Garrett*, 531 U.S. 356, 366-67, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) ("Under rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." (quoting *Cleburne*, 473 U.S. at 441, 105 S.Ct. 3249)).

B. VAGUENESS

The Association's vagueness claim comes in the form of a facial challenge, presenting a hurdle that is difficult for the Association to scale. To bring a successful facial challenge

outside the context of the First Amendment, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Although *Salerno* itself was not a void-for-vagueness case, the principle it articulated was a general one, and the Supreme Court previously explicitly limited facial vagueness claims under the same standard:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.[7]

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (footnotes omitted).

We recognize that, despite the Supreme Court's directive in *Hoffman Estates* and *Salerno*, the Court's most recent discussion of facial vagueness challenges has cast some doubt on the "no set of circumstances" requirement. In *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), the Court did not apply the *Salerno* test in reviewing, and ultimately upholding, a facial challenge to an

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[7] The Association does not proceed under the overbreadth doctrine, which "allows a plaintiff to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir.1997) (citation and internal quotation marks omitted). It claims only that the ordinances are unconstitutionally vague on their face.

ordinance banning gang members from loitering in public places after being ordered to disperse. Rejecting the dissent's argument that *Salerno's* all-or-nothing test applied to all cases other than free-speech cases subject to the overbreadth doctrine, the plurality stated that the *Salerno* formulation was dictum. *Id.* at 55 n. 22, 119 S.Ct. 1849. The plurality further noted that it did not need to resolve the viability of the *Salerno* rule, which it characterized as a species of third-party standing, because *Morales* arose from a state, rather than a federal, court. *Id.* ("Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases—a proposition which is doubtful—state courts need not apply prudential notions of standing created by this Court.").

Although we have not had occasion to consider the impact of *Morales* on facial challenges under the void-for-vagueness doctrine, we have done so in another context. In *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir.2001), we reviewed a facial challenge under the Commerce Clause and rejected the argument that *Salerno* had been undermined. Acknowledging the dicta of the *Morales* plurality, we observed:

> [A]nother plurality of Justices is equally adamant that *Salerno* is the correct standard in every context, with the exception of certain First Amendment cases. *See Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (Thomas, J., dissenting, joined by two justices); *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1026 (9th Cir.1999). While we have held that [*Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)] 'overruled *Salerno* in the context of facial challenges to abortion statutes,' *Lawall*, 180 F.3d at 1027, we will not reject

> *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.

Id. at 467. We subsequently applied the *Salerno* rule to another facial challenge outside the First Amendment context. *See United States v. Bynum*, 327 F.3d 986 (9th Cir.2003) (facial challenge to anti-bribery statute).

We stand by our holding in *S.D. Meyers*. Until a majority of the Supreme Court directs otherwise, a party challenging the facial validity of an ordinance on vagueness grounds outside the domain of the First Amendment must demonstrate that "the enactment is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495, 102 S.Ct. 1186.[8] No such showing was made here, and even if the all-or-nothing principle were inapplicable, the Association's challenge cannot succeed. The ordinances are simply not vague on their face or in their application.

The Association takes issue with the requirement in Ordinance No. 12136 that prohibits hotel operators from contributing to nuisance activities on or in "close proximity to" the property, OMC § 8.03.120(A), but fails to allege that every (or any) application of that provision would qualify as unconstitutionally vague. Indeed, the Association fails even to identify how the ordinance would be impermissibly vague as applied to its own members. Without more, we have little trouble concluding that Ordinance No. 12136 provides sufficient notice to ordinary hotel owners of the conduct that is

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[8] Although we address the *Salerno* rule in the context of a facial vagueness challenge, the rule's fate may also have implications for Fifth Amendment takings challenges. *See Kittay v. Giuliani*, 252 F.3d 645, 647 (2d Cir.2001) (applying *Salerno* to facial takings challenge); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1336 (11th Cir.1999) (same). Our cases generally have not applied *Salerno* to facial takings challenges, and because we uphold dismissal of the Association's takings claim on other grounds, *see supra* Part II, we need not resolve here the precise contours of the rule's application in that context.

prohibited and gives law enforcement ample guidance to enforce it in a non-arbitrary way. *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir.1997) (explaining that "an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.") (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

The phrase "close proximity" clarifies that hotels may not contribute to nuisance activities "on" or "very near" the hotel property. *See* Merriam-Webster's Collegiate Dictionary 941 (10th ed.1993) (defining "close" as "being near in time, space, effect, or degree" and "proximate" as "very near"). The provision in question provides no less than nineteen specific examples of the types of conduct to which this provision applies, such as harassment of passersby, gambling, and prostitution. OMC § 8.03.120(A). When read in context and applied to these forms of conduct, the phrase "close proximity" identifies a "sufficiently fixed place" to provide the type of notice and standards required by the Constitution. *Grayned v. City of Rockford*, 408 U.S. 104, 111, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (approving ordinance forbidding certain activity "adjacent" to school and citing *Cox v. Louisiana*, 379 U.S. 559, 568, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), for the position that "near" a courthouse is not impermissibly vague as applied).

The Association also claims that Ordinance No. 12137, which contemplates criminal penalties, does not contain a mens rea requirement. This omission, argues the Association, conflicts with the Supreme Court's instruction that the absence of a scienter requirement is an important factor in evaluating a vagueness challenge. *See Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). The Court, however, has never suggested that the absence of a

mens rea requirement, by itself, renders a statute unconstitutional. Nor has the Court gone so far as to indicate that the absence of a scienter requirement trumps *Salerno's* requirement that the complainant establish that the law is impermissibly vague in all its applications. *See Hoffman Estates*, 455 U.S. at 497-99, 102 S.Ct. 1186 (recognizing that scienter requirement "may mitigate" a statute's vagueness, but stating that "[t]o succeed . . . the complainant must demonstrate that the law is impermissibly vague in all of its applications"); *see also Staley v. Jones*, 239 F.3d 769, 790-91 (6th Cir.2001) (observing that the Court has not unequivocally stated that a statute without a scienter requirement may be facially invalidated on vagueness grounds without considering whether the statute is invalid in all applications). The Association does not allege that Ordinance No. 12137, which applies the substantive requirements of Ordinance No. 12136 to Deemed Approved hotels, is impermissibly vague in all of its applications. The absence of a scienter requirement does not alter our conclusion that neither ordinance is unconstitutionally vague on its face.

CONCLUSION

In sum, we conclude that the ordinances do not result in an unconstitutional taking of the Association's property under the Fifth Amendment. Nor were the Association's rights to procedural due process and equal protection violated by the enactment of the challenged ordinances. Finally, the Association has failed to demonstrate that the ordinances are unconstitutionally vague on their face. Accordingly, we affirm the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed Jan. 15, 2002]

Case No. C-99-3758-THE(JCS)

HOTEL & MOTEL ASSOCIATION OF OAKLAND, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al.
Defendants.

STIPULATION AND JUDGMENT OF DISMISSAL

Plaintiffs HOTEL & MOTEL ASSOCIATION OF OAKLAND; BALU K. PATEL; USHA B. PATEL, NAVIN PATEL; TARA N. PATEL; BHARAT PATEL; NIKETA PATEL; PARSOTTAM V. PATEL; GITA PATEL; VINOD P. PATEL; MADHUBEN V. PATEL; JAGDISH PATEL; BHARTI J. PATEL; RAMESH D. PATEL; THAKORBHAI G. PATEL; MANJUBEN T. PATEL; KIRIT S. PATEL; RANJAN K. PATEL; MANUBHAI L. PATEL; SHARDABEN M. PATEL; PRAVIN PATEL; SIMA PATEL; NATWARBHAI PATEL; JAGDISHKUMAR B. PATEL; JAYESHKUMAR D. PATEL; HASMUKH B. PATEL; BHISMA PATEL; BABUBHAI K. PATEL; KALABEN B. PATEL; VALLABH H. PATEL; JAMNABEN V. PATEL; RANCHODBHAI D. PATEL; PARBHUBHAI V. PATEL; KAMUBEN P. PATEL; GOVINDBHAI Z. PATEL; MADHUBEN G. PATEL; JOTINDRA PATEL; REKHA J. PATEL; DILIP P. PATEL; KALPANA D. PATEL; ANIL P. KUMAR; SUNITA A. KUMAR; RAJENDRA K. KALYAN; PUSHPA R. KALYAN; BHUPENDRA K. KALYAN; BHARTIBEN B.

KALYAN; NARBADA KALYAN; HARISH SHARMA; NARESH PATEL; and BOBBY NEWMAN (hereinafter "PLAINTIFFS") and Defendants CITY OF OAKLAND; OFFICER D. MARTINEZ; OFFICER T. MARTIN; GERALD DONAHUE; and RONALD ABAD (hereinafter "DEFENDANTS") hereby stipulate to an entry of dismissal of the above captioned action, upon the terms and conditions set forth herein as follows:

DEFENDANTS agree to pay to PLAINTIFFS the sum of FOUR THOUSAND DOLLARS ($4,000.00), payable in trust to their attorney, Frank A. Weiser, California State Bar No. 89780 within thirty (30) days of the date of this stipulation;

PLAINTIFFS allege that the Defendant CITY OF OAKLAND did not comply with local and state law with respect to code enforcement, as set forth in the Second Amended Complaint herein. The CITY OF OAKLAND denies this assertion, and specifically asserts that it has complied and will continue to comply with its own ordinances and with state law with respect to code enforcement. This assertion does not and cannot give rise to any right by PLAINTIFFS, or any of them, to any claim against the CITY OF OAKLAND for breach of contract arising out of this settlement agreement.

The claims that are currently remaining, *i.e.*, those arising under 42 U.S.C. Section 1983 for alleged violations of PLAINTIFFS' rights under the Fourth Amendment of the Constitution, and the claim for intentional discrimination under the Equal Protection Clause of the Constitution are hereby dismissed with prejudice with no right of appeal. The Equal Protection claim based on legislative classification under rational basis review regarding Ordinance Nos. 12136 and 12137 previously dismissed shall be preserved for appeal.

All other claims, including but not limited to the "facial takings" and procedural due process claims previously dis-

missed by this Court pursuant to Motions to Dismiss and/or for Judgment on the Pleadings shall be preserved for appeal. Any "as applied" takings challenge, if it exists, shall be preserved for challenge in a court of competent jurisdiction.

DATED: January 14, 2002

LAW OFFICES OF FRANK A. WEISER

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DATED: January 14, 2002

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Attorney for Defendants, CITY OF OAKLAND, et al.

ORDER

IT IS SO ORDERED.

DATED: 1/14/02

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Aug. 10, 2000]

NO. C 99-3758 TEH

HOTEL & MOTEL ASSOCIATION OF OAKLAND, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, a municipal corporation; DOES 1 THROUGH 10 INCLUSIVE,
Defendants.

ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

The City of Oakland and Oakland Police Officers D. Martinez and T. Martin ("Defendants") move to dismiss this action brought by the Hotel and Motel Association of Oakland ("Association") and its individual members (collectively, "Plaintiffs") pursuant to Fed.R.Civ.P 12(b)(6). Having carefully considered the parties' written arguments, and for the reasons stated below, the motion is GRANTED in part and DENIED in part.

BACKGROUND

Plaintiffs are owners of hotels, motels and rooming houses ("hotels") within the City of Oakland ("City") which, until recently, were nonconforming uses under the Oakland Planning Code ("OPC"). In May of 1999, the City adopted Ordinance No. 12136 and Ordinance No. 12137. Ordinance

No. 12136 requires hotel owners to comply with new maintenance, habitability and record keeping standards. Ordinance No. 12137 reclassified all hotels with nonconforming use status to "Deemed Approved Hotel Activities" and requires that Deemed Approved Hotels comply with the new performance standards in order to retain their Deemed Approved status.

Plaintiffs filed a lawsuit challenging the ordinances in August of 1999. Defendants moved to dismiss on October 8, 1999. In response, on November 4, 1999 plaintiffs filed their First Amended Complaint, containing a litany of constitutional challenges, along with a challenge to a warrantless search of one of the individual plaintiff's hotels by two Oakland police officers. Now before the Court is defendants' motion to dismiss Plaintiffs' First Amended Complaint in its entirety.

LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) when a plaintiff's allegations fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, the Court need not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); 5A WRIGHT

& MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Dismissal without leave to amend is appropriate only where a court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

DISCUSSION

I. FIRST CAUSE OF ACTION AGAINST DEFENDANT CITY OF OAKLAND FOR VIOLATION OF 42 U.S.C. SEC. 1983

Plaintiffs take a shotgun approach in their first cause of action under section 1983 by claiming violation of the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution.

A. Fifth Amendment Takings Claims

Plaintiffs claim that Ordinance No. 12137 constitutes a regulatory taking of their property by the City. Takings claims are divided into "facial" and "as applied" challenges. *Levald v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993). "A facial challenge involves 'a claim that the mere enactment of a statute constitutes a taking,' while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation.'" *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S.Ct. 1232, 1246, 94 L.Ed.2d 472 (1987)).

1. Plaintiffs' Facial Takings Claims

To prevail on the merits of a facial takings claim, plaintiffs must show that the regulation either: (1) denies them the economically viable use of their land, or (2) does not

substantially advance legitimate state interests. *See Sinclair Oil Corporation v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996).

a. Denial of Economically Viable Use of Land

With respect to plaintiffs' claims that they are being denied the economically viable use of their land, the Court notes that the Fifth Amendment "does not prohibit all taking, but merely taking unaccompanied by just compensation." *Sinclair Oil,* 96 F.3d at 405. Consequently, a takings challenge based on the denial of compensation—whether facial or 'as applied'—is unripe "unless the plaintiff has sought 'compensation through the procedures the State has provided for doing so.'" *Id.* at 405-07, quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Here, plaintiffs do not aver that they sought state administrative or judicial remedies to free the property from the ordinance's limitations or in an effort to seek just compensation. Accordingly, plaintiffs' facial challenge, premised on the denial of economically viable use, is dismissed without prejudice as unripe.

b. Legitimate State Interest

Plaintiffs also assert a facial takings claim premised on the theory that the ordinance does not substantially advance legitimate state interests. The just compensation ripeness requirement does *not* apply to "legitimate state interest" facial taking claims, as such claims do not depend on the amount of compensation provided to the landowner. *Id.* at 406-407. The face of the ordinances reveal that they were enacted for reasons related to documented long-standing concerns about crime, prostitution, and general blight traceable to hotels, motels, and rooming houses throughout the City of Oakland. *See* First Amended Complaint, Exhibit 4 at 1-2. The City clearly has "a legitimate need to address problems generated by business involvement in activities that may be inimical to

the health, welfare and safety of the community." *City of Oakland v. Superior Court*, 45 Cal.App.4th 740, 767 (1996). Thus, the Court finds that, as a matter of law, the ordinance on its face substantially advances legitimate state interests. Since there is no possibility that plaintiffs could amend their complaint with additional facts that would change the plain reading of the face of the ordinances, plaintiffs' "legitimate state interest" facial takings claim is dismissed with prejudice.[1]

2. Plaintiffs' 'As Applied' Takings Claim

Next, the Court considers plaintiffs' 'as applied' takings claim under the Fifth Amendment. As with the facial takings claims discussed above, 'as applied' takings claims are unripe unless a landowner has first sought compensation from the state, which plaintiffs have not alleged. *Sinclair Oil Corporation*, 96 F.3d at 405, citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194 (1985).

In the alternative, plaintiffs bring their 'as applied' claim under Article I, Section 19 of the California Constitution,[2] which provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." In California, where the claim is one of a

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[1] Plaintiffs also assert a "private taking" claim. Because a private taking cannot be constitutional even if compensated, a plaintiff alleging such a taking need not seek compensation in state proceedings before filing in federal court. *See Armendariz v. Penman*, 75 F.3d 1311, 1320 n.5 (9th Cir. 1996). However, plaintiffs nowhere allege that the purported takings here are for private use, nor do they specify any private parties who would be the beneficiaries of the purported takings. *Id.* at 1320-21. Consequently, the "private takings" claim must be dismissed without prejudice.

[2] Plaintiffs' claim under the California Constitution is made in the Third Cause of Action in the First Amended Complaint. The Court addresses the matter here due to its close relationship to the federal constitutional takings claims.

"regulatory taking," as here, the state provides a process for obtaining just compensation. California law allows an action for inverse condemnation, which first requires the exhaustion of administrative remedies and subsequently requires a judicial determination that just compensation is due. *Hensler v. City of Glendale,* 8 Cal.4th 1, 13 (1994), cert. denied, 513 U.S. 1184 (1995). Plaintiffs argue that they have satisfied these requirements by seeking declaratory relief from this Court through its exercise of supplemental jurisdiction over the state constitutional takings claim. However, plaintiffs have not alleged that they satisfied the initial requirement of exhausting administrative remedies, which they obviously cannot do in this Court. Consequently, plaintiffs 'as applied' takings claim is dismissed without prejudice.[3]

B. Due Process Claims

Plaintiffs have alleged two procedural due process violations: (1) failure of the City to provide individualized notice, and (2) bias in the City's decision-making process.

1. Individualized Notice

Plaintiffs claim that the City failed to provide some of the Association members with proper notice of hearings that took place before the ordinances were adopted. Specifically, plaintiffs claim that they were entitled to individualized notice. Individualized notice of legislative hearings, however, is not required for ordinances of general applicability. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) (personal notice not required where ordinance increased valuation of all taxable property in city). A failure

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[3] The parties provide the Court with no guidance as to whether a federal court can satisfy the requirement that a party subjected to a governmental taking must seek a judicial determination from the state court that just compensation is due. Due to the conclusion above, the Court need not address this issue at this time.

to provide individualized notice violates procedural due process rights only when a "relatively small number of persons [are] concerned [and] exceptionally affected, in each case upon individual grounds . . . ." *Id.* at 446 (distinguishing *Londoner v. Denver*, 210 U.S. 373 (1908)); *see also Harris v. County of Riverside*, 904 F.2d 497, 502-04 (9th Cir. 1990). The adoption of Ordinance No. 12136 and No. 12137 did not "exceptionally affect" a "relatively small number of persons."[4] Indeed, Ordinance No. 12136 is applicable to every hotel and motel operator in the City, and Ordinance No. 12137 is applicable to every hotel and motel previously recognized as a nonconforming use. Since plaintiffs could not possibly amend the complaint in a way that would alter this conclusion, plaintiffs' procedural due process claim based on lack of individualized notice is dismissed with prejudice.

2. Bias

Second, plaintiffs allege that their procedural due process rights were violated due to bias in the administrative process that led to the adoption of the ordinances. Specifically, plaintiffs allege bias on the part of city council members and planning commission officials stemming from unspecified "deprecatory remarks made at the hearings by several Planning Commissioners and City Council members against plaintiffs as owners and operators of hotels and motels subject to the ordinance." *See* First Amended Complaint, para. 32. This claim is without merit.

Procedural due process claims stemming from allegations of a biased decision maker must relate to an adjudicative proceeding. In particular, due process ensures that all

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[4] In contrast to the instant case, the *Londoner* ordinance affected a small number of property owners with land adjacent to the location of a street improvement. *See Londoner*, 210 U.S. at 374. In *Harris*, the challenged ordinance specifically targeted and affected virtually one property owner. *See Harris*, 904 F.2d at 502-03.

"proceedings which adjudicate . . . interests in life, liberty, or property [shall] be free from bias and partiality . . . ." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir. 1995). This impartial tribunal requirement "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico,* 446 U.S. 238, 242 (1980) (citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)). The term "adjudication," as used in this due process inquiry, has been interpreted to encompass administrative proceedings that are quasi-judicial in nature. *See generally Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973) (state administrative board of optometrists hearing charges against other optometrists is an adjudicative procedure that warrants protection); *Morrissey v. Brewer*, 408 U.S. 471, 485-486 (1972) (impartial tribunal requirement extended to determinations made by parol officer), *Walker v. City of Berkeley*, 951 F.2d 182, 184-85 (9th Cir. 1991) (post-termination hearing before City Manager is an adjudication requiring unbiased decision maker).

Plaintiffs allege that the administrative and legislative process leading to the adoption of the ordinances constituted such an adjudicative proceeding. However, plaintiffs fail to cite authority establishing that this is so. It is clear from plaintiffs' description of the process that it was not quasi-judicial in nature. *See* First Amended Complaint, para. 7-32; *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir.1991), *vacated on other grounds*, 506 U.S. 802 (1992) (due process is satisfied when legislative acts are performed in the normal manner prescribed by law); *In re The Park Beyond the Park v. City of Torrance*, 157 B.R. 887, 892 (9th Cir. 1993).

Plaintiffs fail to provide any specificity as to the content of the comments or the identities of the persons who allegedly made them. In fact, it is difficult to discern the basis upon

which the comments were taken as "deprecatory," as the only basis apparent in the complaint is plaintiffs' status as hotel owners. As such, the purportedly biased statements would appear to pertain to plaintiffs' status as property owners, where those properties, and others like them, were the very matter under consideration at the hearings. The Court need not, and should not, engage in any further speculation or guesswork. It is patently clear that the allegation of bias is insufficiently pled.[5]

Since plaintiffs cannot cure the defect in their complaint regarding the non-adjudicative nature of the proceedings leading to the adoption of the ordinances, plaintiffs' procedural due process claim founded on bias is dismissed with prejudice.[6]

C. Equal Protection Claim

Plaintiffs challenge Ordinance No. 12137 and Oakland Planning Code section 17.114, which create the Deemed Approved program, on the ground that these provisions "are

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[5] With respect to the bias claim, defendants also contend that the city council members and planning commission officials are protected by legislative immunity to the extent their alleged comments were made at legislative hearings. Because these individuals have not been named as defendants, and because plaintiffs' bias claim is dismissed on other grounds, the Court will not address this assertion.

[6] The complaint references the "liberty component" of the Fifth and Fourteenth Amendments, in an apparent effort to trigger substantive due process analysis. However, the analysis required here is not for substantive due process, but for the more specific constitutional violations alleged, including improper takings, and due process and equal protection violations. Where, as here, "a particular amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior that amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1993). The substantive due process claim is therefore dismissed with prejudice.

directed and carried out against plaintiffs and are not directed and carried out in a similar fashion against, [*sic.*] as to other similarly situated hotel and motel operators within the City's borders." *See* First Amended Complaint, para. 57. In support of this claim, plaintiffs allege that the classifications embodied in Ordinance No. 12137 and OPC 17.114 are "'pretextual' and improperly motivated with the intent to drive out and close down plaintiffs' businesses for private developers," and that the classifications target plaintiffs based on their "Asian-Indian origin." *Id.* at para. 58-59; *see also Armendariz v. Penman*, 75 F.3d 1311, 1326-37 (1996) (a pretextual, malicious, irrational, or plainly arbitrary classification does not pass constitutional muster under rational relation test).

In evaluating the facial validity of the ordinance, plaintiffs concede that it is not racially discriminatory on its face. It is equally clear that the ordinance is directed at a broad class of hotel and motel owners, and that it does not distinguish among individuals or groups within that class. Since neither a suspect class nor a fundamental right is implicated on the face of the enactments, the Court applies the rational basis test. *See Southern Pacific v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), cert. denied, 502 U.S. 943 (1991); *Fry v. City of Hayward*, 701 F.Supp. 179, 181 (N.D. Cal. 1988). As the Supreme Court has stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. . . [I]n the

> local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

New Orleans v. Duke, 427 U.S. 297, 303-04 (1976).

The governmental purpose behind the Oakland ordinance is to protect the health and welfare of citizens and visitors in the City of Oakland, as stated in the ordinance itself. The means chosen by the City, through the enforcement of standards designed to improve safety and cleanliness in the areas of these hotels and motels, have an indisputably rational relationship to that legitimate goal. To borrow from the language of the Ninth Circuit in *Southern Pacific*, "the ordinance displays no outward sign of irrationality." *Southern Pacific*, 922 F.2d at 508.

Plaintiffs' only way around the rational basis test is to allege discriminatory intent, which, if well pled, would trigger strict scrutiny review. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994). However, plaintiffs allege nothing more than that the City has "maliciously targeted and threaten[ed]" them with over-enforcement "on the basis of racial and national origin." Plaintiffs provide no clue as to how the City has exhibited its alleged discriminatory intent against the plaintiffs in a council meeting, through an actual application of the ordinance, or by any other means. Once again, the Court need not, and will not, make leaps of faith in construing inferences to support plaintiffs' claims.

Plaintiffs also argue that the Court should view the equal protection claim 'as applied.' However, the allegations in the complaint to support an 'as applied' challenge are purely conclusory. There are no allegations that the ordinance and related code provisions have actually been applied in a discriminatory manner.

Therefore, plaintiffs' equal protection claim is dismissed without prejudice.

D. Fifth Amendment (Void for Vagueness) Claim

Plaintiffs have brought a facial challenge to the ordinances on the ground that they are "void for vagueness" in violation of the Fifth and Fourteenth Amendments.[7] Plaintiffs specifically argue that Oakland Municipal Code section 8.03.120, as amended by Ordinance No. 12136, is impermissibly vague on its face. That code section states:

> 8.03.120 Criminal and nuisance activity.
>
> A. Nuisance Activity. The operation of the property shall not result in repeated nuisance activities on the property or contribute to nuisance activities in close proximity to the property, including but not limited to disturbance of the peace, illegal drug activity, prostitution, public drunkenness, drinking in public other than at a licensed facility, harassment of passers by, gambling, sale of stolen goods, public urination, theft, assaults, batteries, acts of vandalism, illegal parking, excessive loud noises, especially in the late night or early morning hours, traffic violations, curfew violations, lewd conduct, or police detentions and arrests.

See First Amended Complaint, Exh. 3. The ordinance further provides that certain violations may be prosecuted as misdemeanors. *Id.* at Exh. 3 [OMC sec. 8.03.120] & Exh. 4 [OMC sec. 17.157.180].

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[7] Plaintiffs' complaint confusingly claims that the "ordinances are 'void for vagueness' and 'as applied' under the liberty component of the Fifth and Fourteenth amendments." However, plaintiffs' claim must be construed as a facial attack only, as they do not allege that the challenged ordinances have been applied to anyone yet. The only allegation of a specific incident is the alleged search at one of the Plaintiffs' hotels, as discussed *infra*. However, plaintiffs do not allege that the search was conducted pursuant to either of the challenged ordinances.

It is nearly impossible to glean from the First Amended Complaint just which provisions of the ordinances plaintiffs allege are impermissibly vague. The complaint makes minor reference to the lack of definition of the terms "transient" or "occupancy." In their opposition brief, Plaintiffs provide some further specificity, arguing that the ordinances fail to define what "close proximity to the property" means, what constitutes "lewd conduct," and how far from their properties is an "adjacent public sidewalk."[8] Plaintiffs also incorporate into their argument the "additional vagueness claims" which "have been specifically delineated in the complaint," and they chastise defendants for failing to "specifically address" these allegations. Plaintiffs are living in a glass house. The complaint is anything but specific, and it must be at least as challenging for defendants to decipher plaintiffs' disorganized and disjointed claims as it is for the Court. Nonetheless, the Court will continue to view the allegations in the light most favorable to plaintiffs, and will endeavor to find legitimate claims wherever and however they exist in the complaint.

The Supreme Court has expressly directed that the lower courts view requests to strike down statutes as facially vague with extreme caution. As the Court has stated, "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Thus, when examining a facial vagueness challenge, a court "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95 (1982). In

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[8] Plaintiffs also argue that they should not be subjected to criminal sanctions for "contributing" to "nuisance activities in close proximity to the property," instead of restricting the ordinances to activities occurring on the properties. However, this is a challenge to the substance of the ordinance, not a vagueness argument.

other words, the challenger must show that the law is "invalid in toto—and therefore incapable of any valid application. . ." *Stoianoff v. State of Montana*, 695 F.2d 1214, 1219 (1983), quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). The possibility that the ordinance will be enforced arbitrarily or too broadly "is of no due process significance unless the possibility ripens into a prosecution," at which time the injured party may attack the ordinance as it has been enforced against him or her. *Stoianoff*, 695 F.2d at 1222.[9]

To test for vagueness, the Court determines whether the ordinance "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) [citation omitted]; *see also U.S. v. Austin*, 902 F.2d 743, 745 (9th Cir. 1990). In particular, the Supreme Court has stated that "[i]n reviewing a business regulation for facial vagueness . . . the principal inquiry is whether the law affords fair warning of what is proscribed [and that] this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law." *Flipside,* 455 U.S. at 503. The presence of criminal penalties in the ordinances raises the

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[9] The only exception to this limitation is where the enactment implicates constitutionally protected conduct, in which case "a more stringent vagueness test should apply." *Flipside*, 455 U.S. at 498-99. Here, plaintiffs do not contend that the activity prohibited in the ordinances is constitutionally protected. Nonetheless, plaintiffs' complaint about the prohibition on "lewd" activity raises the Court's attention to the possibility of a First Amendment concern. However, the Supreme Court and the Ninth Circuit have reviewed statutes in a number of instances where "lewd" conduct is proscribed, and the clear teaching of those cases is that the term is not unconstitutionally vague. *See Kovacs v. Cooper*, 336 U.S. 77, 80 (1949) (the term "lewd" is "well understood through long use in the criminal law" and is not unconstitutionally vague); *Winters v. State of New York*, 333 U.S. 507, 518 (1948); *US. v. Hamling*, 481 F.2d 307, 312 (1973), aff'd, 418 U.S. 87 (1974) (statute proscribing knowingly mailing "lewd" material is not unconstitutionally vague).

level of scrutiny somewhat, although the Court notes that the criminal sanctions apply only to part of the enactments and the maximum conviction is for a misdemeanor.

In *Village of Hoffman Estates v. Flipside*, the Supreme Court held that a village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs" did not violate the First Amendment rights of a retailer which sold smoking accessories. The Court emphasized that it was not willing to hold that a possibility of uncertainty or confusion should "jeopardize[] the entire ordinance," and proceeded to explain by example that the "theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine . . . is of no due process significance unless the possibility ripens into a prosecution." *Id.* at 503 n.21.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court upheld a local anti-noise ordinance designed to curb disturbances on properties near school buildings. The Court observed: "Condemned to the use of words, we can never expect mathematical certainty from our language." *Id.* at 110. In that case, the Court determined that the geographic restriction to activities "adjacent" to the school described a "sufficiently fixed place." *Id.* at 111. The Court also held that while the "quantum of disturbance" was not specified in the ordinance, it was distinguishable from an impermissible "'breach of the peace'" enactment, in that the former was written for a specific context.

By analogy to both *Flipside* and *Grayned,* in the instant case "close proximity" and "adjacent sidewalk" are sufficiently fixed places, and the nature of the disturbances is quite plainly described. The Court also finds the terms "transient" and "occupancy" to be sufficiently precise to pass muster under a facial vagueness test, as they are sufficiently clear to provide a person of ordinary intelligence fair notice that his

or her contemplated conduct is forbidden by the statute. *See Papachristou*, 405 U.S. at 162. Thus, the Court finds that the ordinances are not impermissibly vague. Since the basis of plaintiffs' vagueness argument, i.e. the language of the ordinances themselves, is fully before the Court, it is apparent that plaintiffs cannot conceivably amend their complaint in a manner that would support a finding of a constitutional violation. The Fifth Amendment "void for vagueness" claim therefore is dismissed with prejudice.[10]

E. Fourth Amendment Claim

Plaintiffs assert a Fourth Amendment claim based on one past warrantless search of a motel and on anticipated future illegal searches. With respect to the Association, "no individual can assert a 'derivative' Fourth Amendment violation on the basis of an intrusion of another's privacy or property." *Wilkinson v. Federal Bureau of Investigation*, 99 F.R.D. 148, 153-154 (C.D. Cal. 1983). Consequently, the Association cannot bring a Fourth Amendment claim that is premised upon a violation executed against one of its members. The Association's Fourth Amendment claim against the City is therefore dismissed with prejudice.

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[10] Defendants also argue that certain of these provisions must be dismissed on the ground that they are time barred. Given the conclusion above, this issue is moot. Nonetheless, the Court notes that, indeed, many of the sections identified in the complaint were not added or amended by the ordinances. These include OMC Sections 5.34.041, 5.34.050, and 4.24.040, which were not altered by the adoption of the ordinances. Pursuant to California Civil Code Section 340(3), the applicable statute of limitations period for plaintiffs' section 1983 claims is one-year. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1998) (state limitation period for personal injury actions appropriate for section 1983 claims). Accordingly, plaintiffs' facial attack must fail on the additional ground of the statute of limitations to the extent that they challenge the validity of OMC sections adopted or amended before the one year limitations period.

The individual plaintiffs contend that their Fourth Amendment claim relates to *threatened* violations of their rights. "In the exceptional case where there is a serious threat of future Fourth Amendment violations, an injunction may lie to prohibit further police misconduct." *Sullivan v. Murphy*, 478 F.2d 938, 965 (1973), cert. denied, 414 U.S. 880 (1973). For example, in *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), the court enjoined officers from continuing a practice in which, on three hundred occasions over nineteen days, the officers had searched third persons' homes, without search warrants and on uninvestigated and anonymous tips, for suspects, in accordance with routine practice and plan conceived by high ranking officials. Here, the only basis for plaintiffs' alleged fear of future violations is their claim that "the City has already taken action against some of the associaion [*sic.*] members in violation of said rights, as evidenced by the actions taken by defendants Martinez and Martin against plaintiff Jayeshkumar Patel." *See* First Amended Complaint, para. 62. Plaintiffs' attempt to convert the single alleged Fourth Amendment violation against Patel into an example of a larger scheme of violations against other members is transparent. No such violations are described in the complaint, nor are they provided in the opposition brief. Without further factual allegations to show that this is an exceptional case with a "serious threat" of future violations, plaintiffs cannot succeed on this claim. Therefore, the Court dismisses the Fourth Amendment claim on behalf of the individual plaintiffs, other than Jayeshkumar Patel, without prejudice.

F. First Amendment Claim

Plaintiffs have brought a First Amendment claim against the City stemming from alleged threats that the ordinances will be enforced in retaliation for instituting this lawsuit. There is no allegation that the City has a policy or practice of retaliating against litigants, and it is axiomatic that the City

cannot be held vicariously liable under section 1983. *See Rizzo v. Goode*, 423 U.S. 362 (1976) (respondeat superior is not a proper basis for liability under section 1983). Even if the complaint could be interpreted to include a claim for violation of a city policy, such policy certainly is nowhere described with even a modicum of specificity. As noted above, the Court need not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council*, 643 F.2d at 624. Therefore, the First Amendment claim with respect to the City is dismissed without prejudice.[11]

II. SECOND CAUSE OF ACTION BY PLAINTIFF PATEL AGAINST ALL DEFENDANTS FOR VIOLATION OF 42 U.S.C. SECTION 1983

In the second claim for relief, plaintiff Jayeshkumar Patel, as an individual, alleges that Defendants violated his First, Fourth, and Fourteenth Amendment rights under 42 U.S.C. section 1983. In order to state a claim under 42 U.S.C. § 1983, Patel must allege (1) that Defendants acted under color of state law and (2) that they violated a right secured by the Constitution. *West v. Atkins*, 487 U.S. 42, 48 (1988). It is undisputed that Defendants acted under color of state law. Thus, plaintiff's claim turns on whether defendants violated his constitutional rights, as discussed below.

A. The Fourth Amendment Claim

Plaintiff Patel alleges that on September 30, 1999, Oakland Police Officers Martinez and Martin searched his motel without a warrant, in the absence of exigent circumstances. Plaintiff does not allege that the police officers conducted the search pursuant to Ordinance No. 12136 or No. 12137; rather,

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[11] The First Amendment claim is more fully discussed in section II., *infra*, with respect to the individual claim of plaintiff Patel.

he merely alleges that the search was conducted after the ordinances went into effect. *See* First Amended Complaint, para. 33.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, proscribes all unreasonable searches. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961). It is a cardinal principle that warrantless searches are per se unreasonable, subject only to a few specifically established and well delineated exceptions. *Id.* The inquiry focuses on whether the conduct was objectively reasonable from the perspective of the defendant at the time of the occurrence. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

1. The Individual Defendants

Defendants argue that the individual officers must be dismissed because they are named in the complaint as Doe defendants.[12] Actually, the caption to the First Amended Complaint identifies the two individuals as "City of Oakland Police Officer D. Martinez Sued as Doe 1; City of Oakland Police Officer T. Martin Sued as Doe 2." In the body of the complaint, plaintiffs allege on information and belief that "Defendant Doe 1 is a City of Oakland Police Officer with the name of D. Martinez . . . and Badge No. 433 and Defendant Doe 2 is a City of Oakland Police Officer with the name of T. Martin . . . and Badge No. 555 and without knowledge of their exact names sues them in said capacity." *See* First Amended Complaint, para. 6. Here the Court is faced with a situation where plaintiff's pleading is, at best,

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[12] The complaint alleges that the individual defendants are not entitled to qualified immunity, and defendants curiously do not dispute the point. While the Court does not address the qualified immunity question, the Court notes that the complaint meets the heightened pleading standard of alleging sufficient non-conclusory allegations. *See Branch v. Tunnell*, 14 F.3d at 449.

unartful, and defendants' argument is, at best, hypertechnical. However, it is clear to the Court that the individual defendants were plainly identified in the complaint, and that they should not escape liability on this ground.[13] Therefore, defendants' motion to dismiss with respect to the Fourth Amendment claim against the individual officers is denied.

2. Defendant City of Oakland

Plaintiff also alleges that the search was performed "according to official policy, custom and practice of the City." *Id.* para. 68. However, plaintiff fails to identify what that policy is. Since there is no allegation that the search was conducted pursuant to the ordinances, and there is no allegation that the City fosters a custom of warrantless police searches, the Court is at a loss to decipher the source of the "policy, custom and practice of the City." As noted above, the Court need not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council*, 643 F.2d at 624. Therefore, with respect to the Fourth Amendment claim against the City, the Court grants the motion to dismiss without prejudice.

B. The First Amendment Claim

Plaintiff Patel alleges that the search of his motel on September 30, 1999, as described *supra*, was in retaliation for plaintiffs' filing of the initial complaint in August of 1999. The right of access to the courts is subsumed under the First Amendment right to petition the government for redress of

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[13] Even if there were any merit to defendants' position, the relation back provisions of California law would allow plaintiff three years from commencement of the action to amend the complaint by adding the true names of the officers. *See Casparian v. Allstate Ins. Co.*, 689 F.Supp. 1009, 1010 (N.D. Cal. 1988); *Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (1989).

grievances. *See Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). Deliberate retaliation by state actors against an individual's exercise of this right is actionable under section 1983. *Id.*

Because of the subjective intent element of this claim, plaintiff has a heightened pleading obligation to "state in [the] complaint nonconclusory allegations setting forth evidence of unlawful intent." *See Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), *cert. denied*, 114 S.Ct. 2704 (1994).[14] Even under traditional pleading standards, the Court need not give plaintiff the benefit of every conceivable doubt; "rather, a court is required only to draw every reasonable or warranted factual inference in the plaintiffs' favor." *McKinney v. DeBord*, 507 F.2d 501, 503 (9th Cir. 1974).

Here, plaintiff asks the Court to go beyond the realm of reasonable inference, and into the realm of unsupported speculation. The incident that forms the basis for the alleged retaliatory action, i.e. the search of plaintiff Patel's motel, occurred *prior* to the naming of the individual plaintiffs in this suit. Plaintiff argues that "it is a reasonable inference that the police officers based upon the City's knowledge did know who the members of the associtión [*sic.*] were when the initial complaint was filed. It is also reasonable to assume that that [*sic.*] the City knew who was subject to the legislation when

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[14] An exception to the traditional pleading rules exists for claims brought pursuant to 42 U.S.C. section 1983, where a heightened pleading standard applies whenever subjective intent is an element of the claim. *Branch*, 14 F.3d 449. The Ninth Circuit has explained that "[t]he allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Id.*, 14 F.3d at 1386, *quoting Whitacre v. Davey*, 890 F.2d. 1168, 1171 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). Where subjective intent it not an element of the claim, however, the traditional pleading standard applies. *See Housley v. United States*, 35 F.3d 400, 401 (9th Cir. 1994).

they adopted the ordinances since these are matters of public records [*sic.*] within the City's control." Plaintiffs' Opposition at 21 [footnote omitted]. The Court does not find these inferences and assumptions nearly as reasonable as plaintiffs contend.

The complaint contains no specific and concrete allegations providing a link between plaintiffs' filing of the complaint and the officers' allegedly retaliatory conduct. Plaintiffs do not allege that the officers knew which hotel and motel owners were in the Association, nor do they allege that the officers even knew of the lawsuit. Plaintiffs' strained argument that "the City's knowledge" (whatever that means exactly) of the Association members involved in the suit could be imputed to the officers cannot withstand scrutiny. Even the traditional pleading requirement demands a finer brush than that which was used in crafting plaintiffs' complaint. Therefore, plaintiff Patel's First Amendment claim is dismissed without prejudice.[15]

III. The Parties' Requests for Judicial Notice

Plaintiffs request judicial notice of a reported Ninth Circuit decision. This is an improper and frivolous attempt to argue beyond the scope of their brief, and is hereby denied. Defendants meet plaintiffs' frivolity by requesting judicial notice of the First Amended Complaint, which of course is already in the Court's possession. Defendants also seek judicial notice of Oakland Ordinance No. 12061 and related portions of Chapter 5.34 of the Municipal Code. Since these provisions are referenced in the Complaint and are relevant to the statute of limitations issue presented in the motion to dismiss, the Court grants judicial notice of this document. *See Branch*, 14 F.3d at 454 ("documents whose contents are

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[15] To the extent that plaintiff Patel also claims a First Amendment violation against the City, the Court's ruling is the same as discussed in section I., *supra*.

alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting it into one for summary judgment). Lastly, defendants seek judicial notice of minutes of meetings between Oakland City staff and members of the Hotel & Motel Association. Defendants do not explain why the Court should grant judicial notice, and the Court finds that the contents of the documents are not alleged in the complaint. *Id.* Therefore, the request regarding the minutes is denied.

CONCLUSION

In light of the above, and good cause appearing, it is HEREBY ORDERED that defendants' motion to dismiss is GRANTED in part and DENIED in part, as follows:

A. With respect to Plaintiffs' First Cause of Action for Violation of 42 U.S.C. sec. 1983 against Defendant City of Oakland:

1. Plaintiffs' Fifth Amendment takings claim premised on the denial of economically viable use is dismissed without prejudice as unripe;

2. Plaintiffs' Fifth Amendment takings claim premised on the failure of the ordinances to substantially advance legitimate state interests is dismissed with prejudice;

3. Plaintiffs' Fifth Amendment "private takings" claim is dismissed without prejudice;

4. Plaintiffs' Fifth Amendment 'as applied' takings claim is dismissed without prejudice as unripe;

5. Plaintiffs' procedural due process claim is dismissed with prejudice;

6. Plaintiffs' substantive due process claim is dismissed with prejudice;

7. Plaintiffs' equal protection claim is dismissed without prejudice;

8. Plaintiffs' Fifth Amendment "void for vagueness" claim is dismissed with prejudice;

9. Plaintiffs' Fourth Amendment claim on behalf of the Association is dismissed with prejudice;

10. Plaintiffs' Fourth Amendment claim on behalf of the individual plaintiffs other than Jayeshkumar Patel is dismissed without prejudice;

11. Plaintiffs' First Amendment claim is dismissed without prejudice.

B. With respect to Plaintiff Jayeshkumar Patel's Second Cause of Action for Violation of 42 U.S.C. sec. 1983 against Defendants City of Oakland, the Police Department, and the individual officers:

1. Defendants' motion with respect to the Fourth Amendment claim against the individual defendants is denied;

2. Plaintiff's Fourth Amendment claim against defendant City of Oakland is dismissed without prejudice;

3. Plaintiff's First Amendment claim against all defendants is dismissed without prejudice.

C. With respect to Plaintiffs' Third Cause of Action for Violation Article I, Section 19 of the California Constitution against Defendant City of Oakland, Plaintiffs' takings claim is dismissed without prejudice.

D. Plaintiffs' Request for Judicial Notice of a reported Ninth Circuit decision is DENIED. Defendants' Request for Judicial Notice is GRANTED in part with respect to Ordinance No. 12061 and Oakland Municipal Code Chapter 5.34, and is DENIED in all other regards.[16]

IT IS SO ORDERED.

DATED 8/9/00

/s/ Thelton E. Henderson
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

[16] Finally, plaintiffs are admonished that a continued failure to present their factual and legal allegations in a clear and coherent manner will inure to their detriment in any future proceedings before the Court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 13, 2003]

No. 02-15220

D.C. No. CV-99-03758-TEH/JCS
Northern District of California,
San Francisco

HOTEL & MOTEL ASSOCIATION OF OAKLAND; BALU K. PATEL; USHA B. PATEL; NAVIN PATEL; TARA N. PATEL; BHARAT PATEL; NIKETA PATEL, PARSOTTAM B. PATEL; GITA PATEL; VINOD P. PATEL; MADHUBEN V. PATEL; JAGDISH PATEL; BHARTI J. PATEL; RAMESH D. PATEL; THAKORBHAI G. PATEL; MANJUBEN T. PATEL; KIRIT S. PATEL; RANJAN K. PATEL; MANUBHAI L. PATEL; SHARDABEN M. PATEL; PRAVIN PATEL; SIMA PATEL; NATWARBHAI PATEL; JAGDISHKUMAR B. PATEL; JAYESHKUMAR D. PATEL; HASMUKH B. PATEL; BHISMA PATEL; BABUBHAI K. PATEL, KALABEN B. PATEL; VALLABH H. PATEL; JAMANABEN V. PATEL; RANCHODBHAI D. PATEL; PARBHUBHAI V. PATEL; KAMUBEN P. PATEL; GOVINDBHAI Z. PATEL; MADHUBEN G. PATEL; JOTINDRA PATEL; REKHA J. PATEL; DILIP P. PATEL; KALPANA D. PATEL; ANIL P. KUMAR; SUNITA A. KUMAR; RAJENDRA K. KALYAN; PUSHPA R. KALYAN; BHUPENDRA K. KALYAN; BHARTIBEN B. KALYAN; NARBADA KALYAN KALYAN; HARISH SHARMA; NARESH PATEL; BOBBY NEWMAN,

Plaintiffs - Appellants,

v.

CITY OF OAKLAND, a municipal corporation; CITY OF OAKLAND POLICE DEPARTMENT; CITY OF OAKLAND POLICE OFFICER D. MARTINEZ SUED AS DOE 1; CITY OF OAKLAND POLICE OFFICER T. MARTIN SUED AS DOE 2; OAKLAND HOUSING INSPECTOR RONALD ABAB SUED AS DOE 3; CITY HOUSING INSPECTOR GERALD DONAHUE SUED AS DOE 4,

Defendants - Appellees.

Before: NOONAN, McKEOWN, and RAWLINSON, Circuit Judges.

The majority has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. Judges McKeown and Rawlinson voted to deny the petition for rehearing en banc and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

ORDINANCE NO. 12136 C.M.S.

Revised 4/27/99

AN ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO CREATE CHAPTER 8.03 "OPERATING STANDARDS FOR HOTELS, MOTEL AND ROOMING HOUSES" AND ADD SPECIFIC RECORD KEEPING REQUIREMENTS IN CHAPTER 5.34

WHEREAS, tax and revenue records indicate that there are currently over eighty hotels, motels and rooming houses in the City of Oakland; and

WHEREAS, individuals who reside in these facilities are dependent upon the management for the provision of safe and sanitary lodging conditions; and

WHEREAS, the existing Housing Code does not directly address the unique aspects of the hospitality industry and the need to provide for specific minimum standards related to room furnishings, linens, housekeeping services and security; and

WHEREAS, a concentration of illegal activity has been tied to the operation of many of the problem businesses, as evidenced by a pattern of multiple and continuous arrests at and within various businesses for prostitution and narcotics use which has been fully documented by the Oakland Police Department; and

WHEREAS, the Oakland Police Department has expended an inordinate amount of time and resources in policing certain of these businesses, in order to limit or control widespread use of the properties for the purpose of narcotics and prostitution activity; and

WHEREAS, the City Attorney has filed ten or more civil abatement actions against operators of these businesses over the past seven years, in an attempt to enjoin the illegal activities at the problem properties; and

WHEREAS, individual actions for injunctive relief and/or closure are not effective substitutes for proper ongoing and regular maintenance and adequate property management; and

WHEREAS, evidence provided by the community in actions filed by the City Attorney strongly support the conclusion that the operators of problem properties take minimal action to screen or to monitor the activities of their patrons, and allow the open use of the property for drug and prostitution activity all hours of the day and night; and

WHEREAS, the activities of patrons engaged in illegal activities at problem properties affect the health and safety of area residents, create a climate of fear and apprehension, and diminish the value of real property in the surrounding area; and

WHEREAS, police surveillance undertaken over the past five years shows that prostitution and drug activity at many of the problem sites takes place openly during all hours of the day and night, and in full view of the operators, who take no significant action to curb the unlawful activities; and

WHEREAS, records show the City has determined over the past five years that a number of problem locations are poorly maintained and structurally unsound, or contain unsanitary and dangerous conditions that threaten the health and safety of lodgers; and

WHEREAS, the City has documented numerous and frequent complaints from the community regarding the visual blight associated with certain poorly maintained problem properties; and

WHEREAS, there is a correlation between high levels of drug and prostitution activity and the existence of sub-standard and public nuisance conditions at the problem properties; and

WHEREAS, in 1986, the Oakland City Council amended the Planning Code to eliminate the "Travel Accommodation Combining" zone which made those hotels or motels outside of the downtown, waterfront and airport areas legal nonconforming businesses; and

WHEREAS, it is in the best interest of the Oakland community and visitors that the City adopt common standards of maintenance, housekeeping, and security that are designed to protect the health, safety and welfare of residents and visitors, reduce crime and nuisances associated with the operation of hotels, motels and rooming houses; and

WHEREAS, the requirements of the California Environmental Quality Act (CEQA) of 1970, the Guidelines as prescribed by the California State Secretary for Resources, and the City's Environmental Review Regulations have been satisfied, and that in accordance with Section 15061(b)(3) or Section 15301 of the California Code of Regulations this project is exempt from the provisions of the California Environmental Quality Act; now, therefore, be it

RESOLVED, THAT THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Section 1. The City Council determines that this Ordinance complies with California Environmental Quality Act and directs the Review Officer to file a Notice of Exemption with the Alameda County Clerk.

Section 2. Chapter 8.03 of the Oakland Municipal Code is hereby added to read:

"Chapter 8.03

HOTEL, MOTEL AND ROOMING HOUSE OPERATING STANDARDS

8.03.010 Title.

These regulations shall be know[n] as Hotel, Motel and Rooming House Operating Standards.

8.03.020 Purpose.

The general purpose of these regulations are to promote the health, safety, comfort, convenience, prosperity, and general welfare by requiring that businesses that offer shelter to visitors, transient guests, and other residents provide a minimum level of cleanliness, quality, and security.

8.03.030 Scope.

These provisions shall apply to businesses such as hotels, motels, and rooming houses which provide shelter, furniture, linens, and housekeeping services, etc. within the guest room(s) and throughout the property. These provisions shall not apply to permanent residential facilities wherein the owner is responsible for providing the shelter, but does not provide furniture, linens, or housekeeping services or with Residential Care Facilities as defined in Oakland Planning Code (OPC) Section 17.10.210.

8.03.040 Definitions.

For the purposes of this chapter certain words and phrases are defined, and certain provisions shall be construed, as herein set out unless it shall be apparent from the context that they have a different meaning:

"Hotel" means any facility as defined in Oakland Municipal Code (OMC) Section 4.24.020.

"Rooming House" means any Rooming House Residential Facility as defined in Section 17.10.690 that houses a

Permanent Residential Activity (OPC Section 17.10.110) or Semi-Transient Residential Activity (OPC Section 17.10.120)

8.03.050 Management Practices.

A. Room rates. Room rates shall be posted in a prominent location ~~in the reception area and~~ in the guest rooms. *Posting room rates in the reception area is strongly encouraged.* Guests shall not be charged in excess of posted rates. A range of rates is acceptable.

B. Management Accessibility. A property management representative shall be accessible, in person or by telephone, on a 24-hour basis. (Also see OMC Section 5.34.051.)

C. Guest Complaints. The telephone number and address for the City of Oakland Building Official shall be posted in a prominent location in the ~~reception area and/or~~ guest rooms. *Posting in the reception area is strongly encouraged.*

8.030.60 Inspection of Records and Facilities.

A. Other Records and Hotel Facilities Subject to Inspection, Review and Audit. Upon a showing of probable cause therefor by the Director of Finance or his or her designee, or by any police officer, code compliance, fire or zoning inspector of the City of Oakland, the City Attorney shall issue an administrative subpoena compelling the inspection of rooms and facilities, and/or the production of guest registers and other records necessary to determine compliance with all applicable regulations, including but not limited to building, fire, health, occupancy, and blight codes, and to verify collection and payment to the City of all taxes owed.

B. Independent Agency Inspections. The City shall conduct annual or bi-annual inspections of all businesses subject to the regulations specified in this Chapter. The City Manager or designee is authorized to promulgate administrative regulations to allow the acceptance of satisfactory ratings conferred by recognized, independent agencies in lieu of a City inspection, provided that the independent inspection is based upon performance and facility standards equal to or in excess of the standards commemorated in this chapter.

8.03.070 Property Security.

A. Guest Room Locks. On or after September 10, 1999, the following is required:

Install and maintain an operable dead bolt lock on each main swinging entry door of a dwelling unit. The dead bolt lock shall be installed in accordance with the manufacturer's specifications and shall comply with applicable state and local codes including, but not limited to, those provisions relating to fire and life safety and accessibility for the disabled. When in the locked position, the bolt shall extend a minimum of 13/16 of an inch in length beyond the strike edge of the door and protrude into the doorjamb.

This section shall not apply to horizontal sliding doors. Existing dead bolts of at least one-half inch in length shall satisfy the requirements of this section.

Existing locks with a thumb-turn deadlock that have a strike plate attached to the doorjamb and a latch bolt that is held in a vertical position by a guard bolt, a plunger, or an auxiliary mechanism shall also satisfy the requirements of this section. These locks, however, shall be replaced with a dead bolt at least 13/16 of an inch in length the first time after July 1, 1999 that the lock requires repair or replacement.

B. Viewports. Each door shall have a viewport or window convenient to the door. Properties with Fire Resistive Construction rated ("Fire Rated") doors, at the time of the adoption of this ordinance, are exempt from this provision to the extent that installing a viewport would negatively affect the fire rating.

C. Connecting Doors. Each door connecting two guest units that share a common wall shall be equipped with a functional deadbolt lock.

D. Window Locks. All windows designed to be opened shall have an operable window security or locking device. Louvered windows, casement windows, and all windows more than 12 feet vertically from the ground are excluded from this subdivision, except where the window is within 8 feet horizontally of a roof or any other platform area.

E. Exit Doors. See Section 15.08.240 of the Oakland Municipal Code.

8.03.080 Housekeeping Conditions in excess of normal "Wear and Tear" (also see Chapter 15.08 "Housing Code")

A. Mattress Condition/Cleanliness. Mattresses shall be free of stains, holes, rips or odors in excess of normal wear and tear, and maintained in a sanitary, non-defective condition (e.g., without broken springs, indentations, sags, etc.).

B. Linen Condition/Cleanliness. Where provided by management, linens shall be free of stains, holes, rips or odors in excess of normal wear and tear and shall be cleaned at change of occupancy or at least once a week when occupancy does not change. Linens shall be cleaned in hot water at least 43°C (110° F) for a minimum of 25 minutes.

C. Bathroom Condition/Cleanliness. Bathroom fixtures (e.g., toilet, bathtub, sink, mirror) shall be maintained without significant cracks, chips, or stains. Floors shall be washed with hot water and a sanitizer at change of occupancy or at least once a week when occupancy does not change. Daily cleaning schedules shall be maintained in the manager's office.

D. Carpet Condition/Cleanliness. Carpeting shall be free of stains, holes, rips or odors in excess of normal wear and tear, and maintained in a sanitary, non-defective condition.

E. Floor Condition/Cleanliness. Floor surfaces shall be made of non-absorbent material. All surfaces and tile grouting shall be maintained without cracks, rips or missing elements.

F. Wall Condition/Cleanliness. Wall surfaces shall be maintained without spots, stains, flakes, chips, holes, etc. and maintained in a clean and sanitary condition.

G. Mold/Mildew. All surfaces, including carpeting and flooring, and fixtures shall be free from mold, mildew, or bubbling conditions.

H. Plumbing. See OMC Section 15.04.

I. Electrical Equipment. For the purposes of this section, electrical equipment shall include furniture items installed by management, including televisions, lamps, etc. See OMC Section 15.08.270.

J. Water Leakage/Water Stains. All fixtures shall be maintained without leaks or drips. Water damage shall be immediately repaired.

K. Furniture Condition. All furniture items provided by management shall be maintained in proper working order.

L. Condition of Shades/Draperies/Blinds. Shades, draperies, blinds, etc. shall be free of stains, holes, rips or odors in excess of normal wear and tear, and maintained in a sanitary, non-defective condition.

M. *Vector Control. The premises shall be kept clean in every part and free from garbage, rubbish, rodents, vermin and other offensive matter.*

8.03.090 Room Furnishings.

A. Privacy. Privacy coverings such as shades, draperies or blinds shall be appropriately hung to cover all windows.

B. Room Light. An active, fully functional light switch shall be located at the main entry to the guest unit.

C. Bathroom Fixtures. Private bathrooms shall have a functioning water closet (e.g., toilet), lavatory (e.g., sink), shower receptor and/or bathtub. This should not be construed to prevent a sink from being placed in a guest room that does no have full bathroom facilities.

D. Shared Bathroom Facilities. Guests in facilities with shared bathrooms shall have access to a functioning water closet (e.g., toilet), lavatory (e.g., sink), shower receptor and/or bathtub. Showering or bathing areas shall be able to be securely locked from the inside. Separate facilities shall be provided for men and women or the facilities shall be able to be locked for individual use. Signs shall be posted indicating that "Children under 12 years of age who use this shared bathroom should be accompanied by an adult at all times."

E. Hot/Cold Water. Hot and cold running water shall be provided for all plumbing facilities.

F. Telephone Rates. Telephone rates shall be posted in every room that has a private phone and be adhered to by management.

G. Emergency Telephone Access. Guests shall have 24-hour emergency access to a telephone (a payphone is adequate) on the property. However, such telephone shall not be made generally available to the public so as to become a public nuisance.

H. Clothes Storage. Space shall be provided in good working order for hanging clothes and/or storing personal belongings.

8.30.100 Exterior of Property.

A. Windows. Exterior window glass shall be without cracks, chips or holes.

B. Exterior Lighting. The exterior of the property, including adjacent public sidewalks and parking lots under the control of the operator, shall be illuminated during all hours of darkness during which the property is open for business in a manner so that persons standing in those areas at night are identifiable from the street. However, the required illumination shall be placed so as to minimize interference with the quiet enjoyment of nearby residents of their property.

C. Painting. See OMC Chapter 8.24 "Property Blight".

D. Landscaping. All areas on the property designated for landscaping, i.e., lawns, planter beds, and other unsurfaced locations, shall be maintained with properly trimmed living plant materials and without collecting litter or debris.

E. Directional Signs. Directional signs shall be posted as appropriate to ensure that emergency personnel can find guest rooms in a timely manner.

F. Exterior Trash/Garbage Storage. All containers used for the storage of trash, garbage, or recycled materials and placed on the exterior of the building(s) shall be maintained in a locked and screened enclosure. Also See OMC Chapter 8.24 "Property Blight" and OMC Section 15.08.230.

8.03.110 Common Areas.

A. Elevators. Guest service elevators need to be fully functional and pass appropriate agency inspections. The name and telephone of the inspection agency shall be posted in all of the elevators. Elevators shall be operational on a 24-hours-a-day basis (as of January 1, 2000).

B. Hallway Lighting. Any lobby area or other public space shall be maintained in a sanitary condition, free of garbage or debris.

8.03.120 Criminal and Nuisance Activity.

A. Nuisance Activity. The operation of the property shall not result in repeated nuisance activities on the property or contribute to nuisance activities in close proximity to the property, including but not limited to disturbance of the peace, illegal drug activity, prostitution, public drunkenness, drinking in public other than at a licensed facility, harassment of passers by, gambling, sale of stolen goods, public urination, theft, assaults, batteries, acts of vandalism, illegal parking, excessive loud noises, especially in the late night or early morning hours, traffic violations, curfew violations, lewd conduct, or police detentions and arrests.

B. Graffiti. All graffiti shall be removed on a continuous basis within 48 hours of application.

C. Litter. Litter shall be removed daily from the premises, including adjacent public sidewalks and all parking lots under control of the operator. These areas shall be swept or cleaned, either mechanically or manually, on a weekly basis to control debris.

8.03.130 Duplicated Regulation.

Whenever any provisions of this Chapter and any other provision of law, whether set forth in this code, or in any other law, ordinance, or resolution of any kind, imposes overlapping or contradictory regulations, or contains restrictions covering any same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in these regulations.

8.03.140 Separate Offenses.

Each violation of this chapter shall constitute a separate offence.

8.03.150 Enforcement by Alternative Methods of Code Enforcement

Any violation of this article may be prosecuted as a misdemeanor, may be charged as a civil penalty or an infraction, or may be pursued as a violation of the Chapter 17.157 Deemed Approved Hotel Regulations. Additionally, the use of the property may be encumbered, as authorized by the Oakland Municipal Code, Chapter 1, Articles 6, 7 and 8. Enforcement action specifically authorized by this article may be utilized in conjunction with, or in addition to, any other statutory, code, administrative or regulatory procedure applicable to the regulation of buildings, structures, or property. In addition, nothing in this article shall be interpreted to preclude or limit the City from seeking injunctive or other judicial relief.

8.03.160 Abatement - Imminent Danger

A. Any condition which is reasonably believed to be imminently dangerous to the life, limb, health or safety of the occupants of the property or to the public, upon reasonable notice provided the owner or responsible person, may be immediately abated by the Fire Marshal and/or the Building Official or their designees.

B. Actions taken to abate imminently dangerous conditions may include, but are not limited to, repair or removal of the condition creating the danger and/or the restriction from use of occupancy of the property on which the dangerous condition exists or any other abatement action determined by the Fire Marshal or Building Official to be necessary. In the event use of occupancy is restricted, the owner or his or her agent shall discontinue the use within the time prescribed by the Fire Marshal or Building Official after receipt of such notice.

C. If entry onto property and access to rooms or units constituting an imminently dangerous condition in violation of this article is denied the Building Official and/or the Fire Marshal by the owner of the property or his or her agent, the Building Official and/or the Fire Marshal may seek a court order and/or inspection and abatement warrant from a court of competent jurisdiction to authorize the immediate abatement of the imminently dangerous conditions.

8.03.170 Recovery of Abatement Costs

Costs for any abatement performed by, or on behalf of, the City, including the cost of extraordinary police services provided, shall be recoverable by the City.

Costs incurred in relocating occupants of the property shall be recovered by the City pursuant to the provisions of Chapter 15.08 Oakland Housing Code and the provisions of the City's Relocation Assistance Program."

Section 3. Section 5.34.025 of the Oakland Municipal Code is hereby added to read:

"5.34.025 Guest Receipts.

A. Receipts. Receipts shall be issued for all cash and non-cash payments at the time paid. Transient Occupancy Tax and any charges other than room rental charges shall be listed separately.

B. Receipts shall be pre-numbered and in sequential order. Receipts may be in sequential order based upon date/time, when a reservation was made, or based upon date/time of registration.

C. Room Numbers. Room numbers shall be included on all receipts, bills and registration cards, with any changes noted.

D. Telephone Charges. Income from telephone charges is taxable and shall be reported.

E. In the event the hotel utilizes a computerized pre-arrival registration and/or billing procedure, the hotel shall not be required to comply with subdivision (B) of this section; provided, however, that the pre-arrival registration and/or billing procedure must be submitted to and approved by the City Manager or his designee, and the hotel be able to certify that payments are properly tracked and recorded so as to create an audit trail."

Section 4. Severability. If any provision or any part of any provision of this Agreement is for any reason held to be invalid unenforceable or contrary to any public policy, law statute and/or ordinance, then the remainder of this Agreement shall not be affected thereby and shall remain valid and fully enforceable.

Section 5. That the effective date of this ordinance shall be September 10, 1999.

I certify that the foregoing is a full, true and correct copy of an Ordinance passed by the City Council of the City of Oakland, California on

May 11, 1999

Ceda Floyd
City Clerk and Clerk of the Council

Per /s/ Terry Lee McCord Deputy

ORDINANCE NO. 12137 C.M.S.

Revised 5/11/99

AN ORDINANCE AMENDING THE OAKLAND PLANNING CODE TO CREATE A "DEEMED APPROVED HOTEL PROGRAM" AT CHAPTER 17.157

WHEREAS, tax and revenue records indicate that there are currently over eighty hotels, motels and rooming houses in the City of Oakland; and

WHEREAS, individuals who reside in these facilities are dependent upon the management for the provision of safe and sanitary lodging conditions; and

WHEREAS, a concentration of illegal activity has been tied to the operation of many of the problem businesses, as evidenced by a pattern of multiple and continuous arrests at and within various businesses for prostitution and narcotics use which has been fully documented by the Oakland Police Department; and

WHEREAS, the Oakland Police Department has expended an inordinate amount of time and resources in policing certain of these businesses, in order to limit or control widespread use of the properties for the purpose of narcotics and prostitution activity; and

WHEREAS, the City Attorney has filed ten or more civil abatement actions against operators of these businesses over the past seven years, in an attempt to enjoin the illegal activities at the problem properties; and

WHEREAS, individual actions for injunctive relief and/or closure are not effective substitutes for proper ongoing and regular maintenance and adequate property management; and

WHEREAS, evidence provided by the community in actions filed by the City Attorney strongly support the conclusion that the operators of problem properties take minimal action to screen or to monitor the activities of their patrons,

and allow the open use of the property for drug and prostitution activity all hours of the day and night; and

WHEREAS, the activities of patrons engaged in illegal activities at problem properties affect the health and safety of area residents, create a climate of fear and apprehension, and diminish the value of real property in the surrounding area; and

WHEREAS, police surveillance undertaken over the past five years shows that prostitution and drug activity at many of the problem sites takes place openly during all hours of the day and night, and in full view of the operators, who take no significant action to curb the unlawful activities; and

WHEREAS, records show the City has determined over the past five years that a number of problem locations are poorly maintained and structurally unsound, or contain unsanitary and dangerous conditions that threaten the health and safety of lodgers; and

WHEREAS, the City has documented numerous and frequent complaints from the community regarding the visual blight associated with certain poorly maintained problem properties; and

WHEREAS, there is a correlation between high levels of drug and prostitution activity and the existence of substandard and public nuisance conditions at the problem properties; and

WHEREAS, in 1986, the Oakland City Council amended the Planning Code to eliminate the "Travel Accommodation Combining" zone which made those hotels or motels outside of the downtown, waterfront and airport areas legal nonconforming businesses; and

WHEREAS, few or none of the legal nonconforming businesses have land use permits with associated conditions that can be revoked for violations of the conditions or public nuisance-related activities; and

WHEREAS, it is in the best interest of the Oakland community and visitors that the City adopt common standards of maintenance, housekeeping, and security that are designed to protect the health, safety and welfare of residents and visitors, reduce crime and nuisances associated with the operation of hotels, motels and rooming houses; and

WHEREAS, the requirements of the California Environmental Quality Act (CEQA) of 1970, the Guidelines as prescribed by the California State Secretary for Resources, and the City's Environmental Review Regulations have been satisfied, and that in accordance with Section 15061(b)(3) or Section 15301 of the California Code of Regulations this project is exempt from the provisions of the California Environmental Quality Act; now, therefore, be it

RESOLVED, THAT THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Section 1. The City Council determines that this Ordinance complies with California Environmental Quality Act and directs the Review Officer to file a Notice of Exemption with the Alameda County Clerk.

Section 2. Chapter 17.157 of the Oakland Planning Code is hereby added to read:

"Chapter 17.157

DEEMED APPROVED HOTEL & ROOMING HOUSE REGULATIONS

Article I. Title and Scope

17.157.010 Title.

The provisions of this chapter shall be known as the Deemed Approved Hotel regulations.

17.157.020 Purpose of Deemed Approved Hotel regulations.

The general purposes of the Deemed Approved Hotel regulations are to protect and promote the public health, safety, comfort, convenience, prosperity, and general welfare by requiring that Hotels and Rooming Houses that were Legal Nonconforming Activities immediately prior to the effective date of the Deemed Approved Hotel regulations comply with the Deemed Approved performance standards at Article III, Section 17.157.060 of this chapter and to achieve the following objectives:

A. To protect residential, commercial, industrial and civic areas and minimize the adverse impacts of nonconforming and incompatible uses;

B. To provide opportunities for Deemed Approved Hotel Activities to operate in mutually beneficial relationship to each other and to other commercial and civic services;

C. To regulate those businesses that provide over night or short term accommodations in order to provide a standard of quality commonly expected of the hospitality industry;

D. To provide that Deemed Approved Hotel Activities are not the source of undue public nuisances or visual blight in the community;

E. To provide for properly maintained Deemed Approved Hotel Activities so that negative impacts generated by these activities are not harmful to the surrounding environment in any way;

F. To monitor that Deemed Approved Hotel Activities do not substantially change in mode or character of operation.

G. To assure that guests and residents at Deemed Approved Hotel Activities are provided safe, clean, and secure accommodations.

17.157.030 Applicability of Deemed Approved Hotel regulations.

A. To Which Property Applicable. The Deemed Approved Hotel regulations shall apply, to the extent permissible under other laws, to all Legal Nonconforming Hotels and Rooming Houses within the City.

B. Duplicated Regulation. Whenever any provisions of the Deemed Approved Hotel regulations and any other provision of law, whether set forth in this code, or in any other law, ordinance, or resolution of any kind, imposes overlapping or contradictory regulations, or contains restrictions covering any same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in the Deemed Approved Hotel regulations.

C. Relationship to the Zoning Regulations. The Nonconforming Use provisions of the zoning regulations including, but not limited to, OPC Section 17.114.020, 17.114.070(A)(4), 17.114.080(A)(1) and (2), shall apply to the Deemed Approved Hotel regulations.

17.157.040 Administrative Hearing Officer.

There is created a Hotel Administrative Hearing Officer. The Hotel Administrative Hearing Officer shall conduct public hearings and establish findings and conditions intended to encourage and achieve compliance with the Hotel Performance Standards at Section 17.157.060 of particular sites as appropriate. This section is not intended to restrict the powers and duties otherwise pertaining to other city officers or bodies, in the field of monitoring and ensuring the harmony of Deemed Approved Hotel activities in the city.

These parties shall have the powers and duties assigned to them by the City of Oakland codes and ordinances, by the City Charter, or by valid administrative authority.

Article II. Definitions

17.157.050 Definitions.

As used in this chapter:

"Condition of approval" means a requirement which must be carried out by the activity in order to retain its Deemed Approved Status.

"Deemed Approved Hotel Activity" means any Hotel or Rooming House that is legal nonconforming and in existence immediately prior to the effective date of the Deemed Approved Hotel regulations. Said business(es) shall be considered a Deemed Approved Hotel Activity as long as it complies with the Deemed Approved Hotel performance standards as set forth in Section 17.157.060 of this Chapter. Said business(es) shall no longer be considered a Legal Nonconforming Activity.

"Deemed Approved Status" means the status conferred upon a Deemed Approved Hotel Activity. Deemed Approved Status replaces legal nonconforming status.

"Illegal activity" means any activity which has been finally determined to be in noncompliance with the Deemed Approved performance standards in Section 17.157.060. Such an activity shall lose its Deemed Approved Status and shall no longer be considered a Deemed Approved Hotel Activity.

"Hotel" shall mean any activity as described in OMC Section 4.24.020.

"Legal Nonconforming Hotel Activity" shall mean any Hotel or Rooming House which was a nonconforming use pursuant to the Nonconforming Use Regulations in OPC Chapter 17.114 at a time immediately prior to the effective

date of the Deemed Approved Hotel regulations. Such an Activity shall be considered a Deemed Approved Activity, and shall no longer be considered a Legal Nonconforming Activity, except such activity shall be subject to those zoning regulations relating to nonconforming uses as specified in OPC Section 17.157.030(C), as of the effective date of the Deemed Approved Hotel regulations.

"Officer" means Administrative Hearing Officer, as provided for at Section 17.157.040.

"Performance standards" means regulations prescribed in the Deemed Approved Performance Standards set forth in Section 17.157.060.

"Permanent Residential Activity" shall mean any activity described in OPC Section 17.10.110.

"Rooming House" shall mean any facility described in OPC Section 17.10.690 housing Semi-Transient Residential Activities and/or Permanent Residential Activities.

"Semi-Transient Residential Activity" shall mean any activity described in OPC Section 7.10.120.

"Transient Habitation Commercial Activity" shall mean any activity described in OPC Section 7.10.440.

Article III. Deemed Approved Performance Standards

17.157.060 Performance Standards and Deemed Approved Hotel Activities.

An activity shall retain its Deemed Approved Status only if it conforms with the provisions of Chapter 5.34 Hotel Rates and Registration Requirements; Chapter 8.03 Hotel, Motel, and Rooming House Operating Standards; Chapter 15.08 Oakland Housing Code, and any applicable provisions of this Code.

Article IV. Deemed Approved Status Procedure

17.157.070 Purpose and applicability.

The purpose of the provisions of this article is to: (A) provide notice of Deemed Approved Status upon Hotels and Rooming Houses that were Legal Nonconforming Activities immediately prior to the effective date of the Deemed Approved Hotel regulations; (B) prescribe the procedure for the imposition of conditions of approval upon those activities; and (C) prescribe the procedure for appealing conditions of approval or the revocation of a Deemed Approved Status.

17.157.080 Automatic Deemed Approved Status.

All Hotels and Rooming Houses that were Legal Nonconforming Activities immediately prior to the effective date of the Deemed Approved Hotel regulation shall automatically become Deemed Approved Hotel Activities as of the effective date of the Deemed Approved Hotel regulations and shall no longer be considered Legal Nonconforming Activities. Each such Deemed Approved Activity shall retain its Deemed Approved Status as long as it complies with the Deemed Approved performance standards at Section 17.157.070.

17.157.090 Notification of owners of Deemed Approved Hotel Activities.

The City shall notify the owner of each Deemed Approved Hotel Activity, and also the property owner if not the same, of the activity's Deemed Approved Status. Such notice shall be sent via certified return receipt mail; shall include a copy of the performance standards of Article III of this chapter; notification that the activity is required to comply with all these same performance standards; ~~that a review fee is required, and the amount of such fee provided in the master fee schedule;~~ and that the activity is required to comply with all other aspects of the Deemed Approved Hotel regulations. Should the notice be returned, then the notice shall be sent via regular U.S. Mail.

17.157.100 Procedure for consideration - Intent.

The provisions of Sections 17.157.100 through 17.157.160 shall outline the process by which Deemed Approved Hotel Activities are required to be reviewed.

17.157.110. Procedure for consideration of violations to performance standards.

As a result of an annual or bi-annual inspection pursuant to OMC Section 8.030.60(B) or upon receiving a complaint from the public, Police Department, or any other interested party that a Deemed Approved Hotel Activity is in violation of the performance standards at Section 17.157.060, and once it is determined by the city that violations appear to be occurring, then the Deemed Approved Status of the Deemed Approved Hotel Activity in question shall be reviewed by the Administrative Hearing Officer at a public hearing. Notification of the public hearing shall be in accordance with Section 17.157.150.

The purpose of the public hearing is to receive testimony on whether the operating methods of the Deemed Approved Hotel Activity is in violation of the performance standards at Section 17.157.060, are causing undue negative impacts in the surrounding area, and/or whether the property is not being maintained in a manner to be habitable by guests or residents. At the public hearing, the Administrative Hearing Officer shall determine whether the Deemed Approved Activity conforms to the Deemed Approved Performance Standards set forth in Section 17.157.060 and to any other applicable criteria, and may continue the Deemed Approved Status for the activity in question or require such changes or impose such reasonable Conditions of Approval as are in the judgement of the Administrative Hearing Officer necessary to ensure conformity with said criteria and such conditions shall be based on the evidence before the Officer. The decision of the Officer shall be based upon information compiled by staff

and testimony from the business owner and all other interested parties. New conditions of approval shall be made a part of the Deemed Approved Status and the Deemed Approved Hotel Activity shall be required to comply with these conditions. The determination of the Officer shall become final ten calendar days after the date of decision unless appealed to the City Planning Commission in accordance with Section 17.157.130.

17.157.120 Procedure for consideration of violations of conditions of approval.

In the event of a violation of any of the provisions set forth in Sections 17.157.010 through 171.57.110 of these regulations, or upon evidence that there has been a failure to comply with any prescribed condition of approval, the Officer may hold a public hearing. Notification of the public hearing shall be in accordance with Section 17.157.150.

The purpose of this public hearing is to receive testimony and determine whether violations to any conditions of approval attached to the site have occurred. The officer may add to or amend the existing conditions of approval based upon the evidence presented; or alternatively may revoke the Deemed Approved Hotel Activity's Deemed Approved Status. The determination of the Administrative Hearing Officer shall become final ten calendar days after the date of decision unless appealed to the City Planning Commission in accordance with Section 17.157.130. The decision of the City Planning Commission shall be final unless appealed to the City Council in accordance with Section 17.157.140.

17.157.130 Appeal to City Planning Commission.

Within ten calendar days after imposition of conditions of approval on a Deemed Approved Hotel Activity or the revocation of Deemed Approved Status, an appeal may be taken to the City Planning Commission by the Deemed Approved Activity owner or any other interested party. In the

event the last date of appeal falls on a weekend or a holiday when city offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by the city. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Officer or wherein its decision is not supported by the evidence in the record. The appeal shall be accompanied by such information as may be required to facilitate review. Upon receipt of the appeal and the required appeal fee in accordance with Section 17.157.160 the Secretary of the City Planning Commission shall set a date for consideration thereof. The Secretary of the City Planning Commission shall, not less than ten days prior thereto, give written notice to: the owner of the Deemed Approved Hotel Activity; the property owner; the appellant in those cases where the appellant is not the owner; the adverse party or parties, or to the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as appropriate, of the date and place of the hearing on the appeal.

In considering the appeal, the City Planning Commission shall determine whether the Deemed Approved Hotel Activity conforms to the applicable Deemed Approved performance standards and/or conditions of approval, and may continue or revoke a Deemed Approved Status; or require such changes in the existing use or impose such reasonable conditions of approval as are, in its judgement, necessary to ensure conformity to said performance standards.

The City Planning Commission shall vote on the appeal within thirty (30) days after its first hearing of the appeal. If the Commission is unable to decide on the appeal at that meeting, it shall appear for a vote on each regular meeting of the Commission thereafter until decided. The decision of the

City Planning Commission on the appeal to the conditions of approval imposed by the Administrative Hearing Officer shall be final.

17.157.140 Appeal on the revocation of a Deemed Approved Status to the City Council.

Within ten calendar days after the date of a decision by the City Planning Commission to revoke a Deemed Approved Status, an appeal from said decision may be taken to the City Council by any interested party. In the event the last date of appeal falls on a weekend or a holiday when city offices are closed, the next date such offices are open for business shall be the last date of appeal. Such appeal shall be made on a form prescribed by the City Planning Commission and shall be filed with the City Clerk. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record. Upon receipt of the appeal and an appeal fee in accordance with Section 17.157.160, the Council shall set the date for consideration thereof. The City Clerk shall notify the Secretary of the City Planning Commission of the receipt of said appeal and the date set for consideration thereof; and said Secretary shall, not less than ten days prior thereto, give written notice to: the owner of the Deemed Approved Hotel Activity; the property owner; the appellant in those cases where the appellant is not the owner; the adverse party or parties, or to the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as appropriate, of the date and place of the hearing on the appeal.

In considering the appeal, the Council shall determine whether the Deemed Approved Hotel Activity conforms to the applicable Deemed Approved performance standards and/or conditions of approval, and may approve or disap-

prove the revocation of the Deemed Approved Status; or require such changes to the existing use or impose such reasonable conditions of approval as are, in its judgement, necessary to ensure conformity to said performance standards.

The decision of the City Council shall be made by resolution and shall be final. The City Council shall vote on the appeal within thirty (30) days after its first hearing on the appeal. If the Council is unable to decide the appeal at that meeting, it shall appear for a vote on each regular meeting of the Council thereafter until decided.

17.157.150 Notification of public hearing before Administrative Hearing Officer.

The Officer shall notify the owner of each Deemed Approved Activity, and also the property owner if not the same, of the time and place of the public hearing. Such notice shall be sent via certified return receipt mail, and shall include notification that the Deemed Approved Status of the Deemed Approved Hotel Activity will be considered by the Officer. The public hearing shall be noticed by posting notices within three hundred (300) feet of the subject property; notice shall also be given by mail or delivery to all persons shown on the last available equalized assessment roll as owning real property in the city within three hundred (300) feet of the subject property. Such notices shall be given not less than ten days prior to the date set for the hearing, if such is to be held. Fees for notification shall be in accordance with Section 17.157.—and paid for by the Deemed Approved Hotel Activity in question.

A. Notice on Site. A city-provided notice of a minimum eight and one-half (8½) by eleven (11) inches in dimension shall also be posted on the premises of the subject activity, placed in the window of the activity (if a window facing the street is not present, then the

placard will be required to be posted onto the exterior of the building). All notices shall advertise the time, date, purpose and location of the public hearing for each particular site. All notices shall be given not less than ten days prior to the date set for the hearing.

B. Notice by Mail. Notice by mail is deemed given on the date the notice is placed into the U.S. Mail system.

17.157.160 Fee Schedule.

Fee, and regulations pertaining to fees, including the ~~review, notification,~~ appeal~~,~~ and reinspection of Deemed Approved Hotel Activities shall be in accordance with the city master fee scheduled.

Article V. Enforcement Procedure

17.157.170 Official action.

All officials, departments, and employees of the city vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, the Deemed Approved Hotel regulations.

17.157.180 Violations and penalties.

A. Infractions. Any person who violates, causes or permits another person to violate any provision of these regulations is guilty of an infraction unless otherwise provided.

B. Separate Offenses for Each Day. Any violator shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of these regulations is committed, continued, permitted, or caused by such violator and shall be punished accordingly.

C. Any Violation a Public Nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this chapter shall be and is declared to be a public nuisance and may be ~~summarily~~ abated as such by the city *after appropriate notice and opportunity to be heard.*

D. Injunction as Additional Remedy. Any violation of any provision of these regulations shall be and is declared to be contrary to the public interest and shall, at the discretion of the city, create a cause of action for injunctive relief.

E. Penalties. Any person convicted of an infraction under the provisions of this section shall be punishable by a fine to the maximum permitted under state law. Any violation beyond the second conviction within a one-year period may be charged by the City Attorney or District Attorney as a misdemeanor, and the penalty for conviction shall be punishable by a fine or imprisonment to the maximum permitted under state law.

F. Liability for Expenses. In addition to the punishment provided by law, a violator is liable for such costs, expenses, and disbursements paid or incurred by the city or any of its contractors in correction, abatement, and prosecution of the violation. Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the owner of the Deemed Approved Hotel Activity. Fees shall be in the amount described in Section 17.157.160 for charged reinspections. The inspection official shall give the owner or other responsible party of such affected premises a written notice showing the itemized cost of such chargeable service and requesting payment

thereof. Should the bill not be paid in the required time, the charges shall be placed as a lien against the property.

17.157.190 Enforcement.

The city shall designate the appropriate personnel to enforce the provisions of these regulations."

Section 3. Severability. If any provision or any part of any provision of this Agreement is for any reason held to be invalid, unenforceable or contrary to any public policy, law statute and/or ordinance, then the remainder of this Agreement shall not be affected thereby and shall remain valid and fully enforceable.

Section. 4. That the effective date of this ordinance shall be September 10, 1999.

I certify that the foregoing is a full, true and correct copy of an Ordinance passed by the City Council of the City of Oakland, California on

May 11, 1999

Ceda Floyd
City Clerk and Clerk of the Council

Per /s/ Terry Lee McCord Deputy

(2)

No. 03-1405

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HOTEL & MOTEL ASSOCIATION
OF OAKLAND, et al.,

Petitioners,

v.

CITY OF OAKLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION RESTATED

Did the Court of Appeals correctly conclude under the due process "void-for-vagueness" standard of *City of Chicago v. Morales*, 527 U.S. 41 (1999) for facial constitutional challenges that a municipal ordinance of the City of Oakland provides sufficient notice to ordinary hotel owners of conduct that it prohibits and provides ample guidance to law enforcement to enforce the ordinance in a non-arbitrary way, and that under the alternative facial constitutional challenge standard of *United States v. Salerno*, 481 U.S. 739, 745 (1987), the ordinance was not unconstitutionally vague in all its applications?

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REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition For Certiorari Should Be Denied Because The Record Does Not Fairly Present The Issue For Which Certiorari Is Sought.

Petitioners advance three grounds for review. These are 1) that the Court of Appeals "refused to apply" this Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (*Morales*), 2) that the Court of Appeals' decision "implicates" an issue of recurring national importance, namely, "the dispute" that has arisen over "conflicting pronouncements by this Court as to the standard for assessing a facial challenge to the constitutionality of a government enactment" and 3) that the challenged regulations are unconstitutional under *Morales*. None of these grounds is persuasive, because the record does not fairly present those issues.

1. The Court Of Appeals Found The City's Ordinance Constitutional Under The *Morales* Standard That Petitioners Contend Should Apply Here.

Both the first and second grounds for review stated in the petition are premised on the contention that the Court of Appeals applied the standard for facial challenges to statutes set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987) (*Salerno*) rather than the standard announced in *Morales*. That premise is incorrect.

In *Salerno*, this Court evaluated a facial constitutional challenge on due process grounds to a federal bail statute. The Court stated that to sustain a facial constitutional challenge, "the challenger must establish that no set

of circumstances exists under which the Act would be valid." *Id.*, 481 U.S. at 745. In *Morales*, the Court was presented with a facial constitutional challenge on due process "void-for-vagueness" grounds to a municipal ordinance. A plurality of this Court concluded that the appropriate analysis was the two-part test articulated in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983): "First, [the ordinance] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56, *see also id.* at 64 (conc. opn. of O'Connor, J., joined by Breyer, J.).

While *Salerno* and *Morales* may accurately be said to have engendered discussion in both the courts and the academy, the dispute over their application is of no moment here because the Court of Appeals found the Ordinance constitutional under *both* standards. Petition, Appendix A at 19a-20a. This case thus does not in fact fairly present the issue urged by petitioners, and review is accordingly inappropriate. *Rogers v. U.S.*, 522 U.S. 252, 258-59 (1986) (certiorari improvidently granted where record does not fairly present question Court called to address.)

Petitioners are correct that the Court of Appeals discussed at some length the contrasting standards for facial challenges of municipal laws as articulated in *Salerno* and *Morales*, and concluded that *Salerno* appeared to be the standard still favored by this Court, since it had not been clearly abrogated by *Morales*. Petition, Appendix A at 17a-19a. However, in holding that the City's Ordinance was constitutional, the Court of Appeals in fact applied both standards – *Salerno's* "no set of circumstances" standard, *and* the two-part test initially articulated in

Kolender and adopted by the plurality in *Morales*. This is made clear by the court's statement that "*even if the all or nothing principle [of Salerno] were inapplicable*, the Association's challenge cannot succeed. The Ordinances are simply not vague on their face or in their application." Petition, Appendix A at 19a (emphasis supplied).

Having made that general pronouncement – that under *either* standard, the City's Ordinance was constitutional – the Court of Appeals engaged in a more detailed analysis of the statutes. Specifically, the question decided by the Court was whether the City's Ordinance "provides sufficient notice to ordinary hotel owners of the conduct that is prohibited and gives law enforcement ample guidance to enforce it in a non-arbitrary way." Petition, Appendix A at 19a. This is the *Morales* standard.[1] *See Morales*, 527 U.S. at 56.

Applying the *Morales* standard, the Court of Appeals "had little trouble" concluding that the ordinance passed constitutional muster. Petition, Appendix A at 19a. This was so because "close proximity", the term in the ordinance that petitioners contend is unconstitutionally vague, was an easily understandable term, one that had been found sufficiently clear in several decisions of this Court. *See* Petition, Appendix A at 20a (*citing Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972); *Cox v. Louisiana*, 379

[1] The Court of Appeals cited its prior decision in *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). Petition, Appendix A at 19a. The language from *Nunez* was itself culled from *Kolender*. *Id.* *Kolender*, of course, is the wellspring from which the language and the reasoning of the plurality opinion in *Morales* flows. *See Morales*, 527 U.S. at 56-64.

U.S. 559 (1965)); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). In addition, the Court of Appeals found that "the provision in question provides no less than 19 specific examples of conduct" to which it applied. Petition, Appendix A at 20a. Together, the court concluded, these provisions provided sufficient notice of conduct that is prohibited and operated to adequately constrain arbitrary actions of law enforcement. *Id.*

In summary, the Court of Appeals, while acknowledging a difference of opinion concerning the standard to apply, nevertheless concluded that the City's Ordinance was constitutional under both standards of review – *Salerno and Morales*. Accordingly, neither the purported "refusal" to apply *Morales*, nor any "dispute" as to the proper standard to apply is properly presented in the record, and the petition should be denied.

2. Petitioners' Claim That The City's Ordinance Is Unconstitutional Under The *Morales* Standard Provides No Proper Basis For Review.

As their third basis for review, Petitioners confidently contend that had the Court of Appeals applied the proper standard, it would have reached the "correct" conclusion that the City's Ordinance is unconstitutionally vague. Petition at 22-25. As explained above, and as is abundantly clear in the record, the Court of Appeals did apply what petitioners contend is the proper standard and concluded that the Ordinance was constitutional. The review petitioners seek is thus necessarily based on the proposition that the Court of Appeals, although it had applied the proper standard, should have reached a different result. An erroneous application of law to fact is,

of course, no basis for granting certiorari, and thus this ground should be rejected as well. *See* Rules of the United States Supreme Court, Rule 10.

Moreover, in reaching the conclusion that the City's Ordinance was constitutional, the Court of Appeals affirmed the findings of the district court. Given this procedural posture, what petitioners actually dispute is as much the application of law to fact by the two courts as it is the choice of which legal standard to apply. Once more, then, petitioners present an issue in a posture not amenable to review under the precedents of this Court. Where, as here, the findings that are challenged have been affirmed by two lower courts, this Court "will not overturn lightly" the concurrent findings of the courts below. *Neil v. Biggers*, 409 U.S. 188, 193 fn. 3 (1972). While that "salutary" rule evidently operates with less force where the dispute is as to the constitutional significance of those findings (*id.*), here, there can be no reasonable dispute as to the correctness of the holdings below. This is so because language similar to that at issue in this case has twice been considered by this Court in the context of a facial "void-for-vagueness" challenge, and has twice been found to pass constitutional muster. *See Village of Hoffman Estates v. Flipside*, 455 U.S. at 503; *Grayned v. City of Rockford*, 408 U.S. at 111.

In addition, petitioners' contention that the Ordinance reaches a substantial amount of innocent conduct is misplaced.[2] Petition at 11. That contention is based not on

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[2] Respondent notes that the conduct by Association members that gave rise to the Deemed Approved program was anything but innocent:

> Whereas evidence provided by the community in actions by the City Attorney strongly support the conclusion that the

(Continued on following page)

the standard adopted in *Morales*, but on the classic formulation of the "overbreadth" doctrine. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 495; *Morales*, 527 U.S. at 52. However, as the Court of Appeals recognized, "the Association does not proceed under the overbreadth doctrine." Petition, Appendix A at 17a, fn. 7. Nor could they have, for this Court has applied the "overbreadth" doctrine only to laws restricting First Amendment rights. *See Morales*, 527 U.S. at 52-53 (plur. opn.), 72 (conc. opn. of Breyer, J.), 77, 79 n.2 (dis. opn. of Scalia, J.).

Petitioners' focus on the *mens rea* issue is similarly misplaced. The absence of a *mens rea* requirement is not, as petitioners seem to suggest, independent proof that a statute is unconstitutionally vague. Petition at 24. As this Court stated in *Morales*, if a law involves criminal penalties, lacks a *mens rea* requirement, and implicates constitutionally protected conduct, then it may be unconstitutional "if vagueness permeates the text of the law." *Morales*, 527 U.S. at 55. If those factors are present, as noted several times, the test to be applied under *Morales* is whether the

---

> operators of problem properties take minimal action to screen or monitor the activities of their patrons, and allow the open use of the property for drug and prostitution activity all hours of the day and night and . . .
>
> police surveillance undertaken over the past five years shows that prostitution and drug activity at many of the problem sites takes place openly during all hours of the day and night, and in full view of the operators, who take no significant action to curb unlawful activities . . .
>
> there is a correlation between high levels of drug and prostitution activity and the existence of substandard and public nuisance conditions at the problem properties.

Petition, Appendix E at 68a.

statute provides sufficient notice of conduct that may subject citizens to criminal penalties and whether it contains sufficient checks on arbitrary enforcement – the test applied by the Court of Appeals here. *Id.* at 56; Petition, Appendix A at 19a-20a. Accordingly, petitioners' discussion of *mens rea* and its effects on statutory analysis provides no independent basis that might favor a writ of certiorari in this matter.

In conclusion, then, none of the three grounds for review advanced by petitioners is fairly presented in the record, and respondent respectfully urges this Court accordingly to deny the petition.

B. Review Of Portions Of The City's Ordinance Other Than The "Close Proximity" Language Considered By The Court Of Appeals Is Inappropriate.

Petitioners ultimately acknowledge the dispositive fact that the Court of Appeals applied the *Morales* standard, but attempt to downplay its significance, averring that the Court of Appeals' discussion was "limited" to the Ordinance's "close proximity" language. Petition at 22-23. It is not surprising that the Court's discussion was limited to that language. Review of the decisions of the district court and the Court of Appeals reveal that, although repeatedly admonished to provide specific facts and arguments to support their "vagueness" arguments, petitioners were ultimately able to point only to the "close proximity" language contained in OMC section 8.03.120(A). Thus, the "close proximity" language was the only provision that petitioners specifically challenged and actually presented to the Court of Appeals for its review.

The decision of the district court is instructive in this regard:

> It is nearly impossible to glean from the First Amended Complaint just which provisions of the ordinances plaintiffs allege are unconstitutionally vague. The complaint makes minor reference to the lack of definition of the terms "transient" or "occupancy." In their opposition brief, Plaintiffs provide some further specificity, arguing that the ordinances fail to define what "close proximity
> to the property" means, what constitutes "lewd conduct" and how far from their properties is an "adjacent public sidewalk." Plaintiffs also incorporate into their argument the "additional vagueness claims" which "have been specifically delineated in the complaint" and they chastise defendants for failing to "specifically address" these allegations. Plaintiffs are living in a glass house. The complaint is anything but specific, and it must be at least as challenging for defendants to decipher plaintiffs' disorganized and disjointed claims as it is for the Court.

Petition, Appendix B at 37a.

The district court then concluded that the terms "close proximity" and "adjacent sidewalk" were sufficiently clear as to provide a person of ordinary intelligence fair notice that his conduct, or contemplated conduct was prohibited by law. Petition, Appendix B at 40a.

On appeal, the record is equally clear: the only provision presented to the Court of Appeals as unduly vague was the "close proximity to the property" language of OMC section 8.03.120(A). Petition, Appendix A at 20a.

Seen, then, in its proper context, petitioners are asking this Court to review the question of how the Court of Appeals *might* have ruled had it been presented with the argument that never-identified provisions of the Ordinances were unconstitutionally vague. Those hypothetical questions present no basis for review by this Court.

Faced with the fact that the Court of Appeals did apply the standard set forth in the *Morales* plurality to the only provision presented to it that petitioners claimed was vague, petitioners now argue that the decision must be reviewed because the City's Ordinance imposes an obligation on motel owners to police for nuisances. Petition at 2, 4-5, 11.

As an initial matter, there is no merit to their assertion that the Ordinance requires them to "police" for nuisances of which they may be unaware. The challenged provision on its face only requires petitioners to maintain their properties so that they neither constitute a nuisance, nor contribute to the proliferation of nuisance activities. Petition, Appendix E at 62a (OMC section 8.03.120). Thus any violation of the Ordinance that might result in a criminal penalty necessarily must be based on conduct emanating from petitioners' own properties, for which they cannot claim ignorance.

More fundamentally, these grounds present an improper basis for review, because petitioners never presented the issue to the Court of Appeals. The closest petitioners came to raising the question was before the district court, where they claimed they should be subject to criminal penalties for only nuisances that occur on their property, and not for those that occur in proximity to their

properties. The district court correctly characterized that allegation as a substantive claim that was irrelevant to the question of whether the Ordinance was vague. Petition, Appendix C at 37a, fn. 8. That was as far as the question went; it played no part in petitioners' appeal. Petition, Appendix A, *passim*. Here, again, petitioners urge review based on an issue that was not before the Court of Appeals, and their petition must be denied on that basis as well.

C. This Case Is An Inappropriate Vehicle Because There Has Been No State Court Construction Of The Ordinance At Issue Here.

A due process "void-for-vagueness" challenge to a *state* statute like the City's Ordinance here can turn on whether the state's courts have adopted a limiting construction of the challenged statute. *Morales*, 527 U.S. at 61 & n.31 (opn. of the Court), 65, 68 (conc. opn. of O'Connor, J.), 73 (conc. opn. of Breyer, J.). *Morales*, for example was a due process challenge to a municipal ordinance raised initially in state court by the petitioners as a defense to their criminal prosecutions. In deciding their challenge, this Court looked to and relied on the authoritative construction the ordinance had received from the state's highest court. *Morales*, 527 U.S. at 61 (opn. of the Court), 65 (conc. opn. of O'Connor, J.).

Here, by contrast, this case is not a state court enforcement action against petitioners, and there have been no reported state court decisions construing the ordinance as applied to petitioners or others. Instead, petitioners brought this as a federal court section 1983 action in which they are the plaintiffs. The absence of any state court construction of the City's Ordinance raises additional

barriers of prudence, federalism, and comity that strongly counsel against this Court using this case as the vehicle for deciding important questions regarding facial constitutional challenges on due process "void-for-vagueness" grounds, and provides yet another reason for denying the petition.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 10, 2004

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(3)

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IN THE

Supreme Court of the United States

HOTEL & MOTEL ASSOCIATION OF OAKLAND, *et al.*,
Petitioners,

v.

CITY OF OAKLAND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In our petition, we demonstrated that review by this Court is necessary to resolve an issue of recurring national importance concerning the appropriate standards that apply to assess facial challenges to the constitutionality of a statute. Pet. 11-25. We showed that there is a conflict among this Court's decisions regarding the proper standard for evaluating such a challenge, and that this conflict is reflected most clearly in this Court's decisions in *United States* v. *Salerno*, 481 U.S. 739 (1987), and *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). Pet. 12-17. Moreover, we demonstrated that the conflict between these standards presents an issue of surpassing national importance, that has generated debate among Justices of this Court, as well as confusion among the courts of appeals, which have struggled to reconcile this Court's competing approaches, *id.* at 12-21.

Finally, we showed that this case is a proper vehicle for resolving this conflict because the court below (i) recognized the conflict between *Salerno* and *Morales*, Pet. App. 17a-18a, (ii) made clear that it would remain bound by this Court's decision in *Salerno* ("[u]ntil a majority of the Supreme Court directs otherwise"), *id.* at 19a, and (iii) applied the *Salerno* test to reject petitioners' challenge to two ordinances enacted by the Council of the City of Oakland that impose criminal liability when hotel operators are deemed to be "contributing to nuisance activities on or in 'close proximity to' the property," *id.* Further, petitioners showed that the court of appeals' adoption of the *Salerno* test was outcome determinative because the court below could not have reached the same judgment if it had applied this Court's decision in *Morales*. Pet. 22-25.

Respondents' Opposition ("Opp.") narrows the area of dispute to a single issue. They do not (and can not) deny that there is a tension between this Court's decisions in *Salerno*

and *Morales*, or that the proper standard for addressing facial challenges presents an issue of surpassing importance that *should* be resolved by this Court. Nor do they dispute that this conflict has generated significant confusion among the federal courts of appeals struggling to reconcile this Court's inconsistent pronouncements. Opp. 2. Instead, they argue that further review is not warranted *in this case* because the decision below "does not fairly present" this issue, *id.* at 1, in that court of appeals "applied both standards," *id.* at 2.

In making that argument, respondents cannot dispute that the court of appeals devoted significant effort to explaining why it felt bound by this Court's decision in *Salerno* rather than *Morales*. Pet. App. 17a-19a. That predicate determination was essential because, as respondents acknowledge, the court of appeals never addressed, under *Morales*, petitioners' core claim whether the challenged Ordinances were invalid because they subject to criminal penalties otherwise innocent conduct that law-enforcement officials deem to have "contribute[d]" to "nuisance" activity on or "in close proximity" to hotel property. *Id.* at 7-10. Respondents argue that the court of appeals' failure to address this claim under *Morales* should be excused because petitioners' never advanced this claim on appeal.

Respondents' argument is demonstrably wrong. Petitioners expressly argued to the court of appeals that the Ordinances were unconstitutionally vague under *Morales* because they lacked a mens rea requirement and carried criminal penalties for "contributing" to "nuisance" activities that occurred on or in close proximity to their property. Opp. 7-10. Petitioners explained that this combination of factors rendered the challenged ordinances unconstitutionally vague under *Morales* by creating "a 'trap for those who act in good faith,'" Appellants' Opening Br. 29, and allowing "law enforcement to arbitrarily enforce the ordinance," Appellants' Reply Br. 9. The suggestion that this issue was not presented to the court of appeals is thus directly refuted by the appellate record.

The court of appeals' strict reliance upon *Salerno* to reject petitioners' claims implicates an issue that has generated a conflict among this Court's decisions on an issue of national importance. The petition for certiorari should be granted.

I. A SINGLE STANDARD SHOULD GOVERN FACIAL CONSTITUTIONAL CHALLENGES TO GOVERNMENT ENACTMENTS.

There is no dispute that there are two competing standards in this Court's decisions for assessing facial constitutional challenges to government statutes, and that these conflicting standards have generated confusion among the courts of appeals. Pet. 12-21. Respondents do not quarrel with the claim that this Court's decisions in *Salerno* and *Morales* reflect irreconcilable tests for assessing facial challenges to the constitutionality of a statute. Further, respondents acknowledge that this conflict has led to "discussion" in the courts and the academy, including an extensive discussion by the court below in this case. Opp. 2.

The resulting confusion among lower courts concerning the appropriate standard to apply to facial constitutional challenges is an important and recurring question of federal law. Given the importance of this issue, the only argument that respondents provide for opposing further review by this Court is their claim that the question whether *Salerno* or *Morales* provides the appropriate standard is not "properly presented in the record." Opp. 4. As shown below, that argument is incorrect and should be rejected.

II. THE CONFLICT BETWEEN THIS COURT'S COMPETING STANDARDS IN *SALERNO* AND *MORALES* IS SQUARELY PRESENTED.

Respondents predicate their opposition to certiorari by this Court almost exclusively on their claim that the court of appeals rejected petitioners' vagueness claim under both *Salerno* and *Morales*. Opp. 1-4. In doing so, respondents rely on the court of appeals' statement that "'even if the all-

or-nothing principle were inapplicable, the Association's challenge cannot succeed.'" Opp. 3 (emphasis and alteration omitted) (quoting Pet. App. 19a.). Respondents, however, acknowledge that the court of appeals' statement was directed solely to petitioners' challenge to the "close proximity" language of Ordinance No. 12136. *Id.* at 7-10. They argue that the court of appeals' failure to address the vagueness claims highlighted by petitioners before this Court should be ignored because they contend that "the 'close proximity' language was the only provision that petitioners specifically challenged and actually presented to the Court of Appeals for its review." *Id.* at 7. That claim is contrary to the record.

A. Petitioners' Claim Under *Morales* Was Properly Presented To The Court Of Appeals.

Petitioners' challenge to the impermissible vagueness of Ordinance Nos. 12136 and 12137 was *not* limited to the phrase "close proximity." That conclusion is confirmed by a review of petitioners' briefs before the court of appeals.

In those briefs, petitioners clearly argued that the absence of a *mens rea* requirement made "a facial challenge particularly appropriate." Appellants' Opening Br. 28. Specifically, petitioners challenged the "performance standards under Ordinance No. 12136," which required that "the operation of the property shall not result or contribute to nuisance activities in 'close proximity' to the property." *Id.* at 29. Petitioners explained that the ordinances set "a 'trap for those who act in good faith'" because, "[w]ithout a mens rea standard," one could be held strictly "liable for contributing to such [nuisance] activity in close proximity to the property," *Id.* Indeed, petitioners underscored the vagueness of the standards to which property owners were required to adhere to avoid criminal sanctions: "What is the standard for the terms 'contribute' or 'close proximity to the property'?" *Id.*

Petitioners further took issue with the district court's rejection of their vagueness claim because it was "focused on

the type of nuisance activity,"—*i.e.*, the conduct that could qualify as a nuisance—but was "devoid of any meaningful analysis in relation to *these terms* or the lack of a *mens rea* requirement." *Id.* (emphasis added). In reply, petitioners explained that, in light of absence of a mens rea requirement, "vagueness 'permeates' throughout the regulation in failing to provide one with fair notice, and the ability of law enforcement to arbitrarily enforce the ordinance and make it a trap for the unwary." Appellants' Reply Brief 9.

These are precisely the same claims that petitioners have advanced before this Court and are precisely the same claims that respondents acknowledge were *not* addressed by the court of appeals under *Morales*. Both here, and in the court of appeals, petitioners challenged Ordinance No. 12136 because it "criminalizes a broad swath of purely innocent conduct." Pet. 4-5; cf. Appellants' Opening Brief 29 (arguing that ordinance "is a 'trap for those who act in good faith'"). Both here, and in the court of appeals, petitioners showed that Ordinance No. 12136 was unconstitutionally vague because the interplay between terms such as "nuisance" and "contribute," coupled with the absence of any mens rea requirement, give law enforcement officials "unbridled discretion" to "decide what activities constitute a violation." Pet. 23; cf. Appellants' Reply Br. 9 (explaining that "vagueness 'permeates' throughout the regulation in failing to provide one with fair notice, and the ability of law enforcement to arbitrarily enforce the ordinance and make it a trap for the unwary").

In light of the appellate record, respondents are thus mistaken when they argue that further review should be denied because petitioners' claims of unconstitutional vagueness were limited to a challenge to the "close proximity" language of Ordinance No. 12136. To the contrary, respondents' tacit (and correct) acknowledgement that any application of *Morales* by the court of appeals' was limited solely to an assessment of the "close proximity"

language of Ordinance No. 12136, confirms that the court of appeals applied only *Salerno* (and not *Morales*) to the core of petitioners' vagueness challenges.

The court of appeals' failure to apply *Morales* is underscored separately by its treatment of petitioners' challenge to the omission of a mens rea requirement. Specifically, when addressing petitioners' argument that the lack of a mens rea element rendered the ordinance hopelessly vague, the court of appeals ruled only that this Court's decisions "never suggested that the absence of a mens rea requirement, by itself, renders a statute unconstitutional." Pet. App. 20a-21a. As support, the court of appeals held that the absence of a mens rea element did not trump *Salerno*'s requirement "that the complainant establish that the law is impermissibly vague in all its applications." *Id.* at 21a. That is, the court of appeals rejected as irrelevant the absence of a mens rea requirement based solely upon *Salerno*. *Id.* (rejecting petitioners' facial vagueness challenge because, under *Salerno*, "[t]he Association does not allege that [the ordinance] is impermissibly vague in all of its applications").[1]

B. The Court Of Appeals' Rejection Of *Morales* Is Outcome Determinative.

As petitioners demonstrated previously, the court of appeals' decision to apply *Salerno* rather than *Morales* is outcome determinative because if the court below had applied the *Morales* standard, it would have concluded that Ordinance No. 12136 is unconstitutionally vague. Respondents dispute that conclusion, arguing that petitioners' reliance upon the criminalization of innocent conduct and the absence of any

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[1] Respondents contend that this case is not amenable to review because the findings challenged have been affirmed by two lower courts. Opp. 5. That principle has no application here because the court of appeals made no findings under *Morales* with regard to the heart of petitioners' challenges to Ordinances Nos. 12136 and 12137.

mens rea requirement are "misplaced." Opp. 5. These arguments cannot be reconciled with *Morales*.

First, although *Morales* generated a number of separate opinions, a majority of the Court agreed that a statute that "reach[es] a substantial amount of innocent conduct" and fails to "establish minimal guidelines to govern law enforcement" is unconstitutionally vague even when challenged on its face. 527 U.S. at 60 (opinion of Court) (internal quotation marks omitted). Nevertheless, respondents insist that the question whether "the Ordinance reaches a substantial amount of innocent conduct" is relevant only to the "overbreadth" doctrine which applies solely "to laws restricting First Amendment rights." Opp. 5, 6. That argument is wrong under *Morales*, which held that the "broad sweep" of a criminal statute is central to vagueness challenges outside the First Amendment context. 527 U.S. at 60 (opinion of Court). That principle is especially relevant here, because Ordinance No. 12136 conscripts the owners and operators of hotels and motels in the city of Oakland to police potential "nuisance" activities on or in close proximity to their property and subjects them to criminal penalties based upon nuisance activity in which they took no part and about which they may have been wholly unaware.

Second, respondents never address the remaining prong of the *Morales* standard: whether the law establishes minimal guidelines to govern the exercise of law enforcement. See 527 U.S. at 60 (opinion of Court). Ordinance No. 12136 gives law enforcement officials unbridled discretion to determine whether the operation of a hotel "results in" or "contributes to" nuisance activity. It is not supported by any type of limiting construction that might guide law enforcement officials. Rather, as was the case in *Morales*, the ordinance provides law-enforcement officials with "'absolute discretion'" to decide what activities or operations constitute a violation. *Id.* at 60-61. Ordinance No. 12136 thus runs afoul of both prongs of *Morales* because it criminalizes a

substantial amount of innocent conduct and fails to provide minimal guidelines for law enforcement.

Equally unavailing is respondents' merits argument regarding the relevance of a mens rea requirement. Respondents assert that the absence of a mens rea requirement is not independently sufficient to establish that a statute is unconstitutionally vague. Opp. 6. Petitioners made no such claim. To the contrary, both petitioners and respondents recognize the test set forth by the plurality in *Morales*: a law that involves criminal penalties, contains no mens rea requirement, and infringes on constitutionally protected rights, is subject to facial attack "[w]hen vagueness permeates the text." 527 U.S. at 55; Pet. 24; Opp. 6.

Ordinance No. 12136 cannot pass muster under this test because it suffers from the same defects as the ordinance struck down in *Morales*. First, it imposes criminal penalties for violations of operating standards for hotels and motels. Second, the ordinance contains no *mens rea* requirement. Third, the ordinance implicates the constitutionally protected right to earn a living. See *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972) (the liberty guaranteed by the Fourteenth Amendment includes "'the right of the individual . . . to engage in any of the common occupations of life'") (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). Because the ordinance satisfies these three elements from *Morales*, the court below should have inquired whether vagueness "permeates" the text of the ordinance.

C. The Absence Of A Limiting Construction Does Not Undermine The Need For Certiorari Review.

Finally, respondents contend that review of this petition is inappropriate because there has been no state court construction of the ordinances at issue. Opp. 10-11. Of course, respondents never suggested any limiting construction in these proceedings, and the notion of such a limiting construction is inconsistent with the "all-or-nothing" *Salerno*

standard that respondents advocated. But even if respondents had offered such a construction, the absence of a state-court construction limiting the scope of the ordinances does not undermine the need for review.

Respondents properly recognize that the loitering ordinance challenged in *Morales* had been construed by the state supreme court, and this Court was bound by that construction. Opp. 10; *Morales*, 527 U.S. at 61 (opinion of Court). To be sure, when "evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982). Yet this Court has never held that the absence of a narrowing construction is a prerequisite for review. To the contrary, as this Court explained in *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), "we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit." *Id.* at 770 n.11. As a result, if a statute is not "obviously susceptible of a limiting construction," the federal court should evaluate the facial challenge even if the statute has never been interpreted by a state tribunal. *City of Houston* v. *Hill*, 482 U.S. 451, 468 (1987). As noted, respondents have not suggested a construction that would limit the scope of Ordinance Nos. 12136 and 12137.

Moreover, the vagueness of Ordinance No. 12136 is not resolved through any obvious sort of limiting construction. Because the operation of a hotel or motel will not be visible to the public, law enforcement officials necessarily will be obligated to infer violations of Ordinance No. 12136 based on the existence of one or more nuisance activities on or near the hotel property. Thus, hotel and motel owners and operators can be held criminally liable for the conduct of others even if they are wholly unaware of the conduct or have no control over it. Considering the broad sweep of the ordinance and the

absence of guidelines for enforcement, further review by this Court is appropriate.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of certiorari should be granted.

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